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Central Law Journal.

ST. LOUIS, MO., JUNE 9, 1893.

The Supreme Court of South Dakota very properly refuses to act as legal adviser to the legislature of that State. The governor lately called upon that court, at the request of both houses of the legislature, to construe a section of the constitution, which declares the number of votes that shall be necessary for the passage of a law, in anticipation of certain rulings under such section by the presiding officers of the legislature; the question involved being one of purely parliamentary procedure. The constitution of the State provides that the governor "shall have authority to require the opinion of the judges of the supreme court upon important questions of law involved in the exercise of his executive powers, and upon solemn occasions." The court held that the provision was confined exclusively to such questions as may raise a doubt in the executive department and never in the legislative.

The tendency, of late years, has been to do away with or restrict the practice, incident to some of the States, of calling upon the supreme court for counsel or advice in advance of actual litigation. It still exists in some States. In Massachusetts, the legislature as well as the governor may call upon the supreme court to act in an advisory capacity. It will be remembered that last year the supreme court of that State made reply in response to the query of the legislature, that an act authorizing cities to purchase and supply fuel to their inhabitants would be unconstitutional. (See 35 Cent. L. J. 61, 91.) At one time there existed in Missouri a constitutional provision of this character, but the framers of the Missouri constitution of 1875, "profiting," as the South Dakota court says, "by experience," excluded it. Colorado has gone farther in this direction than any of the other States. The express words of its constitution are "that the supreme court shall give its opinion upon important questions, upon solemn occasions when required by the governor, senate or the house of representatives." By this provision that court appears to be the legal adviser of the governor, senate and house of representatives—occupying much the same relation, in this regard, as does an attorney-general. Yet under this broad provision the supreme court of that State has held that the section applies only to cases where questions of public right are involved, and that even then questions of this character should rarely be thus presented or considered. Wheeler v. Irrigration Co., 9 Colo. 248; *In re* Constitutionality of Senate Bill, No. 65, 12 Colo. 466. The following language with which the South Dakota court concludes its opinion, states very clearly and forcibly the objections which may properly be interposed against such use of the Supreme Court.

> In an opinion this constitutional provision was never intended to be called into requisition unless some "important question of law" was involved in the exercise of executive functions, or upon "solemn occasions." It is confined exclusively to such questions as may raise a doubt in the executive department—never in the legislative. Were we to construe it otherwise, it would be liable to become the medium of great abuse. It certainly could not have been intended to authorize an *ex parte* adjudication of important questions of law by means of executive questions, nor could the purpose have been to exact a response for an exposition of a constitutional provision relating to a given general subject in anticipation of certain rulings of the presiding officers of the senate or house of representatives, upon purely parliamentary law.
>
> It may not be improper for us to further suggest that a satisfactory response to the resolution would require vast research, and extraordinary caution. Whenever we assume the right to answer such questions, we must act, both as court and counsel, upon *ex parte* proceedings. It is a principle declared by our constitution (section 2, art. 6), and of universal recognition, that no person shall be deprived of life, liberty, or property without due process of law. There can be no due process of law unless the party to be affected has his day in court. Yet a hasty construction and application of this provision might lead to the *ex parte* adjudication of private rights by means of an executive question, without giving the party interested a day or voice in court.
>
> Again, it could not have been the intention of the constitution makers to permit the presentation of questions as to whether a bill has been passed by the legislature by the requisite number of votes or not. This question, primarily, must be left to the judgment of that department of our government, and their judgment must be final until it shall be called in question through the usual avenue provided for testing it. A proper regard for the constitutional arrangement of the different departments of government and the constitutional powers and duties devolving upon each department, forbids the conclusion that this court should have anything to do with such matters. It is not our duty to give advice upon any question relating to fact or policy. It is the exclusive province of the legislature to judge of the necessity or desirability of each question or act performed.
>
> The question propounded by the joint resolution under consideration calls for the construction of an important section of the constitution, relating purely

to legislative duty and requirement. Any answer to the question would necessarily affect vast property interests, and profound questions of public policy. There may be now, in this and other courts of the State, actions through which some of these matters are in process of adjudication. To anticipate such cases, and pass in this summary manner upon the right involved, without the parties before us, and without the aid of counsel, is something we should not be asked to do, except upon the gravest and most urgent necessity.

NOTES OF RECENT DECISIONS.

WRITS—SERVICE OF SUMMONS—FAILURE OF SUMMONS—FAILURE TO ATTACH SEAL.—The case of Choate v. Spencer, 32 Pac. Rep. 651, decided by the Supreme Court of Montana, is of special interest involving the question as to the validity of a summons of court, without a seal attached. Code Civil Proc. Montana §§ 527, 528, provide that the district court shall have a seal, and that the clerk of the court shall keep the seal. Section 68 provides that the summons "must" be issued under the seal of the court. It was held that a summons issued out of the district court without the seal of such court being attached was void, and the service thereof on the defendant, in an action in such court, gave the latter no jurisdiction. And that a decision of the Supreme Court of the United States construing a statute which is, in effect, the same as a statute of Montana, and rendered while the latter was a territory, is controlling on the supreme court of this State. Pemberton, C. J., says, *inter alia:*

At common law, a writ issuing from a court having a seal, in order to be considered authentic or of any value, must be attested by the seal of the court from which it is issued. The laws of this State provide that the district courts shall have a seal (section 527, Code Civil Proc.), and that the clerk of the court shall keep the seal (section 528, *Id.*) And section 68 *Id.*, requires that the summons must be issued under the seal of the court. So that, under our statutes, there is no departure from the common law rule requiring such writs to be authenticated by the seal of the court from which they issue. The appellant has cited a number of authorities holding the common-law doctrine that such writs must be authenticated by the seal of the court from which they are issued in order to give them validity, and without which they would be void. The principal case relied upon by appellant in support of his contention that the summons under discussion was void for want of the seal of the court is Insurance Co. v. Hallock, 6 Wall. 556. This case went to the Supreme Court of the United States from Indiana, and involved the validity of a deed executed and delivered by a sheriff to real estate, under an order of sale, under a statute of that State. The statute required the order of sale to be issued under the seal of the court. The seal was omitted from the order of sale. In delivering the opinion of the court, Mr. Justice Miller says: "If the paper here called an 'order of sale' is to be treated as a writ of execution or *fieri facias* issued to the sheriff, or as a process of any kind issued from the court, which the law required to be issued under the seal of the court, there can be no question that it was void, and conferred no authority upon the officer to sell the land. The authorities are uniform that all process issuing from a court which by law authenticates such process with its seal is void if issued without a seal. Counsel for plaintiffs in error have not cited a single case to the contrary, nor have our own researches discovered one. We have decided in this court that a writ of error is void for want of a seal, though the clerk had returned the transcript in obedience to the writ. We have held that a bill of exceptions must be under the seal of the judge." This was a collateral attack made upon the deed executed by the sheriff, under the order of sale from which the seal had been omitted. Counsel for the respondents contend that the case just cited is not controlling, and claim that the Indiana courts have declined to follow the rule therein asserted, and cite a number of Indiana cases in support of their position. From an examination of the Indiana cases cited by respondents, we are of opinion that the departure from the rule asserted in Insurance Co. v. Hallock, *supra*, has been occasioned by the legislation in Indiana since the decision in 6 Wall. In support of this view, we quote from State v. Davis, 73 Ind. 360, this case being cited by respondents. In this case the court say: "It is undoubtedly true, as appellees insist, that at common law a writ issuing from a court must, in order to be entitled to be considered as regular and authentic, be attested by the seal of the court from which it issued. Williams v. Vanmeter, 19 Ill. 293; State v. Flemming, 66 Me. 142; Wheaton v. Thompson, 20 Minn. 196 (Gil. 175); Reeder v. Murray, 3 Ark. 450. The case of Insurance Co, v. Hallock, 6 Wall. 556, does decide that an order of sale issued by a court of this State was void because not attested by the seal of the court. It has also been held by this court that, where there is no statute to the contrary, a writ or record must be attested by the seal of the court from which it comes. Jones v. Frost, 42 Ind. 543; Hinton v. Brown, 1 Blackf. 429; Sanford v. Sinton, 34 Ind. 539. The older cases did hold that a writ lacking the seal of the court was absolutely void, but there is much conflict upon this point among the modern cases, many of them holding that such a writ is not void, but merely voidable. Our court long since held that such a writ was not void. It is true, as argued by appellees, that a summons so clearly defective as to be insufficient to confer jurisdiction cannot, after judgment, be so amended as to give jurisdiction. If a summons without a seal be conceded to be void, then there can be no amendment, for it is axiomatic that a void thing cannot be amended. The liberal provisions of our statute respecting the summons would take such writs from under the old common-law rule, even if it were conceded that it is the rule which must be adopted respecting other writs. The provisions of the Code upon this subject are contained in article 4, and the provision which directly bears upon this point is found in section 37, and is as follows: 'No summons or the service shall be set aside or be adjudged insufficient where there is sufficient substance about either to inform the party on whom it may be served that there is an action instituted against him in court.'" It must appear as conclusive that the court

in this case would have held the summons void but for the statute of Indiana, quoted in their opinion. This case seems to us to be strong authority for holding that, but for the statute of Indiana in relation to the essentials of a summons, that court would have held to the doctrine contained in 6 Wall., to-wit, that such writs, without the seal of the court from which they issued, are void.

Counsel for the respondents have cited many authorities to the effect that defective process cannot be attacked in a collateral proceeding, and to the effect that defective process is amendable in many States. But this is not a collateral proceeding. It is a direct proceeding to have a deed canceled, which is not void on its face, but which is alleged to be void because of its being the result of a judgment void for want of jurisdiction of the court rendering it, and which deed is a cloud upon the title of the party seeking relief. See 3 Pom. Eq. Jur. § 1395 *et seq.*

CONTRACTS FOR THE SALE OF LAND AND FORECLOSURE THEREOF.

Where there is a contract for the sale of real estate to be completed at a specified time, there must be an offer to perform on behalf of the plaintiff at the time designated to authorize a recovery of damages at law for a breach of the contract. In equity, however, in ordinary cases, time is not of the essence of the contract. Where the general object is the sale of an estate for a particular sum, the particular day named is merely formal, and the stipulation in fact means that the purchase shall be completed in a reasonable time, taking into consideration all the circumstances of the case and the nature of the title to be conveyed.[1] In Hopwell v. Knight, *supra*, Alderson, B., says (p. 415): "After examining with as much attention as I can the various cases brought before me during the argument, it seems to me to be the result of all of them that a court of equity is to be governed by this principle—it is to examine the contract, not merely as a court of law does to ascertain what the parties have in terms expressed to be the contract, but what is in truth the real intention of the parties and to carry that into effect." He also says (p. 416): "In the case of a mortgage, however, which I use rather for the purpose of illustrating the principle than as at all parallel to the present case, the court, looking at the real contract, which is the pledge of the estate for the debt—treats the time mentioned in the mortgage deed as only a formal part of it, and decrees accordingly, taking it to be clear that the general intention should override the words of the particular statute." In King v. Hamilton,[2] the Supreme Court of the United States say: "It has become almost as much a matter of course for a court of equity to decree specific execution of a contract for the purchase of lands, where in its nature and circumstances it is unobjectionable, as it is to give damages at law where an action will lie for a breach of the contract. But this power is to be exercised under the sound judicial discretion of the court with an eye to the substantiated justice of the case. Where a party comes into a court of chancery seeking equity he is bound to do justice, and not ask the court to become an instrument in iniquity. Where a contract is hard and destitute of all equity the court will leave the parties to their remedy at law; and if that has been lost by negligence they must abide by it.

It is a settled rule therefore to allow a defendant in a bill for specific performance of a contract to show that, it is unreasonable, or unconscientious, or founded in mistake, or other circumstances leading satisfactorily to the conclusion that granting the prayer of the bill would be inequitable and unjust. Gross negligence on the part of the complainant has great weight in cases of this kind." In Taylor v. Longstreet,[3] the contract of purchase was made in 1814, and interest regularly paid till 1822, when the vendor, because of the default of the vendee, instituted an action of ejectment and recovered possession. In 1819, one Chambers made a claim to the property and instituted an action to recover the possession thereof, and this action was not terminated until 1829. In 1825, the plaintiff brought his action to enforce the contract, and the action was sustained as the circumstances were deemed to justify the delay in making the payment. Story, J., says: "There is no doubt that time may be of the essence of the contract for the sale of property. It may be made so by the express stipulation of the parties, or it may arise by implication from the very nature of the property, of the avowed objects of the seller or the purchaser, and even when time is not thus either expressly or impliedly of the essence of the contract, if the party seeking a specific per-

[1] Seton v. Slade, 7 Ves. 265; 2 L. C. in Eq. 537; Hipwell v. Knight, 1 Y. & C. Exch. Ca., 415.

[2] 4 Pet. 328.

[3] 14 Pet. 172.

formance and has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part; or if there has in the other intermediate period been a material change of circumstances affecting the rights, interests or obligations of the parties; in all such cases courts of equity will refuse to decree any specific performance upon the plain ground that it would be inequitable and unjust. But except under circumstances of this sort or of an analogous nature, time is not treated by courts of equity as of the essence of the contract; and relief will be decreed to the party who seeks it if he has not been grossly negligent and comes within a reasonable time although he has not complied with the strict terms of the contract."[4] In Gibbs v. Champion,[5] specific performance was decreed although there had been a failure to pay the first installment at the time set. It is said (p. 337): "We cannot regard the contract to pay a condition precedent authorizing the rescission of the contract upon a failure. And if we do so consider it there is no proof that the respondent proceeded on this ground. He held the contract and notes though payment of the first installment was not made. He never offered to return them and certainly took no steps which could have operated to exonerate the complainant from his liability." In Decamp v. Feay,[6] the defendant had purchased lands for $4,000 and paid $2,500 of the purchase price when the vendor refused to perform and alleged a failure to pay at the day. In delivering the opinion of the court, Gilson, C. J., said: "I am clear that it was not in the power of the defendant below to rescind the contract. Where time admits of compensation, as it perhaps always does where lapse of it arises from money not having been paid at a particular day, it is never an essential part of the agreement." In Longworth v. Taylor,[7] Judge McLean said: "There may be some danger in avoiding the loose expressions of Lord Thurlow on this subject of going to the other extreme. We may look more at the letter of the contract than its substance. We may regard a morality so strict in that respect as to be governed by legal technicalities and substantially cut off this great branch of equitable jurisdiction. In almost all the modern cases in which time has been strictly regarded, it was made the essence of the contract by the express agreement of the parties; and the language of the decisions combats the idea that this cannot be done. To hold that the failure of the vendee to pay the purchase-money for an hour, or a day, should of itself authorize the vendor to rescind the contract, would disregard the distinction which has heretofore been made between the action of a court of law and chancery. Not that the latter has a dispensing power over contracts; but regarding the substance of the contract as well as its letter if the chancellor finds that the delay of payment has not operated injuriously to the vendor; that the condition of the parties is the same as when the payment should have been made; that the value of the property has not materially changed; and the same justice can be done under the circumstances as if the payment had been made at the time stipulated chancery will not refuse its aid." In Cheney v. Libby,[8] where time was declared in the agreement itself to be the essence of the contract, the court, after stating the rule that time may be made the essence of the contract, says: "But there are other principles founded in justice that must control the decision of the present case. Even where time is material by express stipulation, the failure of one of the parties to perform a condition within the particular time limited will not in every case defeat his right to specific performance, if the condition be subse-

[4] To the same effect Davison v. Jersey Co., 71 N. Y. 333; Wonson v. Ferno, 129 Mass. 405; Chadwell v. Winston, 3 Tenn. Ch. 160; Henderson v. Hicks, 58 Cal. 364; Moots v. Screven, 33 Mich. 500; Pritchard v. Todd, 38 Conn 413; Brassell v. McLamone, 50 Ala. 476; Sharp v. Trinner, 24 N. Eq. 422; Converse v. Blumrick, 14 Mich. 109, s. c., 90 Am. Dec. 230; Decamp v. Feay, 5 S. & R. 323, 9 Am. Dec. 372; Ballard v. Ballard, 25 W. Va. 407; Gray v. Tubbs, 43 Cal. 359; Peck v. Brighton, 69 Ill. 200; Tilton v. Stein, 87 *Id.* 122; Snider v. Lehnherr, 5 Oreg. 385; Russell v. Baughman, 94 Penn. St. 400. In Totty v. Harris, 48 N. W. Rep., the Iowa Supreme Court, where the plaintiff purchased a house at a sale under a decree and agreed to sell it to the defendant upon condition that she would pay the purchase price and redeem the property from certain tax sales within 60 days from the time of recording the deed. The cashier of a bank named was to receive the money. The defendant deposited with the cashier the sum of $3,750 within the time named, which both she and the cashier supposed to be the actual amount due, although the actual amount to be paid was $3,784.42. The court held that there had been a substantial compliance with the contract and on paying the additional $34.42 the defendant would be entitled to a decree.

[5] 3 Ohio, 335.

[6] 5 Serg. & R. 323.

[7] 1 McLean, 402.

[8] 134 U. S. 78.

quently performed without unreasonable delay, and no circumstances have intervened that would render it unjust or inequitable to give such relief. The discretion which a court of equity has to grant or refuse specific performance, and which is always exercised with reference to the circumstances of the particular case before it.[9] Many other cases of the same effect might be cited.

Time the Essence of the Contract.—In Jennison v. Leonard,[10] A agreed to sell timber lands to B for a large sum, payable in three annual installments, B agreeing to cut a certain amount of timber per year which was to be sold to make the payments. The vendor reserved a right of entry in case of failure to pay, and time was to be the essence of the contract, and it was held that the vendor had a right upon default in making payments to terminate the contract. In the case cited the vendee was in possession, not making improvements thereon, but was destroying the timber for which the land was chiefly valuable. In Dennslaldt v. Smith,[11] the plaintiff, who had leased certain premises, had the right to purchase the same on certain conditions within three years. He failed to exercise the right upon the conditions named within the time, and it was held that time was the essence of the contract. In Carter v. Phillips,[12] A gave B "the right and privilege to purchase within the limit of time of such notice the said business at the cost price of the stock, of the fixtures and machines and the lease of the premises." On the last day of the option B gave A notice that he accepted the proposition, but did not offer to pay the price or comply with the provisions of the proposition, and it appeared that he was unable to pay for the property; and it was held that he was not entitled to specific performance. In Goldsmith v. Guild,[13] where the property was subject to frequent fluctuations in value and there was an actual change in value, time was held to be of the essence of the contract. Substantially the same rule was announced in Brashier v. Gratz.[14] In Hoyt v. Tuxbury,[15] it was held that if a purchaser of real estate urged in good faith that the title was bad, as an excuse for not performing at the day, he would be excused, but if in bad faith he would not be. In Milward v. Earl of Thanet,[16] the parties differed as to the construction of the contract, and an action for specific performance was not brought until seven years had elapsed. Alvanley, M. R., dismissed the bill and held that a party who invokes the aid of a court of equity to enforce the performance of a contract must show that he has been ready, desirous, prompt and eager. This seems to have been an executory contract where the vendee acquired no estate in the land and as applied to such a contract—in fact a mere option the language is justified. The case, however, is cited and sometimes applied unjustly, I believe, to executed contracts. The cases in which time may be the essence of the contract may be divided into three classes: First. Where the property is liable to increase or diminish in value, or from a change of circumstances, mistake or misapprehension it would be unconscientious to enforce the contract. In such case the court may refuse relief or grant it upon such conditions as seem just.[17] Second. From the nature of the property to be conveyed—such as stocks which are liable to daily fluctuations, the purchase of a reversionary interest where the seller is supposed to have sold for cash,[18] or where an agreement is made to sell by a day named at a valuation to be made by persons named.[19] Third. Where there is an express stipulation to that effect and the contract is executory at the time of the default, no considerable part of the consideration having been paid.[20] In the case cited nothing had been paid on the contract and there was an express condition in the contract that if the conditions were not complied with at the day the contract should thereupon terminate. In Edgerton v. Peckham,[21] the plaintiff had purchased certain premises which were to be paid for in three installments.

[9] Hennesy v. Woolworth, 128 U. S. 438; Seton v. Slade, 7 Ves.
[10] 88 U. S. 302.
[11] 51 N. Y. 628.
[12] 144 Mass. 100.
[13] 10 Allen, 239.
[14] 19 How. 527.
[15] 70 Ill. 331.
[16] 5 Ves. 720.
[17] Mechanics' Bank v. Lynn, 1 Peters, 383; Alley v. Deschamps, 13 Ves. 225; Spurrier v. Hancock, 4 Ves. 667; Main v. Melbourn, *Id.* 720; Pope v. Simpson, 5 *Id.* 145.
[18] Newman v. Rogers, 4 Bro. C. C. 391; Osmond v. Anderson, 2 Ball & Beat, 370; Edgerton v. Peckham 11 Paige, 354.
[19] Edgerton v. Peckham, 11 Paige, 354.
[20] Wells v. Smith, 2 Edw. Ch. 78.
[21] 11 Paige.

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After two installments had been paid the vendor declared the contract at an end and all payments forfeited under a provision to that effect in the contract, but the court notwithstanding the provision decreed performance. Cases may be found where considerable payments have been made on the contract and improvements made on the property that it has been held that time was the essence of the contract and on the failure to pay any installment at the day, the vendor is entitled not only to the land and the improvements made by the vendee but to all payments made by him. I am unable to believe that such judgments are based upon reason or justice. The effect in many cases is to rob those struggling with difficulties or adverse fortune of their property and bestow it upon those who have no just right or claim to the same. An examination of the cases will show a constant tendency in the leading courts of the country to sustain the contract if possible and enforce the same, notwithstanding some of the conditions may not have been complied with at the day. There is also a tendency to avoid the lax rules of construction of Lord Thurlow on the one hand and the stringent rules of Kenyon, C. J., and Alvanley, M. R., on the other, and enforce the contract in any proper case. Where the purchaser is in default and it is desired to bar his right to enforce the contract the vendor may file a petition to foreclose or bar his right. The reasons and, to some, extent the procedure in such case, are clearly stated by Jessel, M. R.,[22] in a comparatively recent case as follows: "It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is, not in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase-money. Their positions are analogous in another way. The unpaid mortgagee has a right to foreclose, that is to say, he has a right to say to the mortgagor "either pay me within a limited time, or lose your estate," and in default of payment he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a court of equity; he has a right to say to the purchaser, "either pay me the purchase-money, or lose the estate." Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the court of equity, or now by a judgment of the high court of justice; and if the time expires without the money being paid, the contract is cancelled by the decree or judgment of the court, and the vendor becomes again the owner of the estate. In other words, the vendee is considered in equity as the owner of the estate although he may not have paid the purchase price and the vendor holds the legal title as trustee to be conveyed to the vendee upon his compliance with the terms of the contract. In effect the legal title is held by the vendor as security for the payment of the purchase-money. If the vendee is in default the remedy given by the courts of equity of England is a suit in strict foreclosure, the decree being that the vendee pay the stipulated price by a day named or be barred of all rights under the contract. This procedure seems to be generally followed by the courts of this country, although in a few States a sale is ordered. In framing the petition the plaintiff should first set forth the contract or its substance. This no doubt will contain a description of the property and a promise to convey on payment of the purchase-money.

2. Allege a failure to comply with the terms of the contract, stating in what respect a default has been made.

3. State any other fact showing a default of the defendant, such as the payment of taxes by the plaintiff and the amount thereof.

[22] Lysaght v. Edwards, L. R. 2d Ch. Div. 490.

The prayer will be that payment be made by a day fixed by the court or in case of default that the contract be cancelled.

There is some conflict in the cases as to whether or not it is necessary to allege a tender of a deed. The better opinion seems to be that where the deed is to be made by the plaintiff it is unnecessary to allege such tender,[23] because the object of the action and the contract itself calls for the execution and delivery of the deed upon payment of the purchase-money, and the judgment will be so framed.

If, however, the action is brought by the executors or administrators of the vendor, a tender of a deed must be alleged.[24] In the case cited the petition set forth the contract, the payments thereon, the amount due and unpaid, the death of the testator leaving a will and the issuing of letters testamentary to the plaintiffs. The court held that it should also have alleged an offer to convey as the title was not in the plaintiffs.

If the heir or devisee is made a party so as to be bound by the decree no tender is necessary.[25] All persons who possess an interest in the land under the contract must be made parties or they will not be affected by the decree.[26]

The ordinary form of the decree is that the money due on the contract be paid within such reasonable time as the court shall direct, and in case of failure to make such payment that the defendant's interest in the premises be foreclosed—in effect the contract cancelled. A court of recognized ability held that it would be improper to order a sale of the premises because the title was in the vendor.[27] This objection would seem to be untenable, the parties are before the court, and it should make such decree as will do justice between them. If the purchaser has paid a considerable part of the purchase-money or made valuable improvements on the property greatly increasing its value, it would seem but justice to treat the transaction as in fact a mortgage and order a sale with right of redemption. In most cases the security is ample and all that the vendor is entitled to is his money with interest. This he should have, but the vendee has rights in the premises at well. Many causes without his fault may render a worthy person unable to pay at the day, and it is not the business of courts to encourage sharpers to take an unjustifiable advantage of the misfortunes of others.

The vendor is not confined to his remedy by foreclosure, but may, if he sees fit, bring an action upon the notes and recover judgment against the vendee to be satisfied out of any property, he may have liable to be taken on execution.[28] In some of the States a decree of foreclosure may be had as in an ordinary mortgage, the premises sold under the decree and judgment for a deficiency recovered.[29] In such case the prayer should be in substance that an account be taken of the amount due the plaintiffs, and the defendant be required to pay the same by a day certain, or that the premises be sold and the proceeds applied in payment of the amount so found due with costs, etc. A prayer for such other relief as may be just and equitable should be added to cover any possible variation in the relief granted. SAMUEL MAXWELL.

[23] Freeson v. Bissell, 63 N. Y. 168; DeForest v. Holum, 38 Wis. 516; Church v. Smith, 39 *Id.* 492; Maxw. Code Pl. 192.

[24] Thomson v. Smith, 63 N. Y. 301.

[25] *Id.* In Arkansas an allegation of tender seems to be necessary. Wakefield v. Johnson, 26 Ark. 506; Turner v. Lassiter, 27 *Id.* 662. And in Indiana: McCaslin v. State, 44 Ind. 151; Cole v. Wright, 50 *Id.* 296. In Mississippi: Kloyce v. Broyles, 37 Miss. 524.

[26] Tuke v. Turner, 44 Iowa, 575.

[27] Button v. Schroyer, 5 Wis. 598.

[28] Hershey v. Hershey, 18 Iowa, 24; Linsley v. Logan, 33 Ohio St. 376.

[29] Linsley v. Logan, 33 Ohio St. 376; Hershey v. Hershey, 18 Iowa, 24.

CRIMINAL LAW — ARREST WITHOUT WARRANT—OFFENSE IN PRESENCE OF OFFICER.

STATE V. LEWIS.

Supreme Court of Ohio, January 31, 1893.

Where a breach of the peace is committed in the presence of a marshal of an incorporated village or city he may, without warrant, arrest the persons who participated therein. If, however, the officer was absent when such offense was committed, and did not appear there until after the affray had ended, public order restored, and the guilty parties had departed from the vicinity, and all the information the officer had of the affray, and of the parties to it, was the statements of the bystanders who witnessed it, he has no authority in law to pursue and arrest the persons charged with the offense without first obtaining a legal warrant therefor.

BRADBURY, C. J.: The defendant was indicted for murder in the second degree, for causing the death of one Edward Elliott, in the course of an attempt to arrest the latter for the commission of a misdemeanor. The defendant was marshal to the village of Hillsborough, in Highland county.

and being put upon trial for the homicide, it became material to inquire into the authority of such officers to make arrests without a written warrant therefor; and after the evidence had been given the prosecuting attorney requested the court to give to the jury certain legal propositions, the object of which was to define the authority vested by law in the marshal of an incorporated village to arrest without written warrant alleged offenders against the laws of the State or the ordinance of the village. The third proposition requested reads as follows: "If you find from the testimony that the breach of the peace did not occur in the presence of the defendant, and was over, and the deceased had ceased from the commission of a breach of the peace, and that the affray was ended, and the deceased was not attempting a continuation of the breach of the peace, but was about his peaceful and lawful avocations when the defendant arrived at the place where the affray had taken place, and the defendant did not attempt to make the arrest until he had gained such knowledge as he possessed of the affair from inquiries made of third persons, such arrest or attempted arrest was unlawful, and the deceased had a right to resist such arrest or attempted arrest; and the defendant, under these circumstances, was himself in the performance of an act for which he must be held responsible."

This proposition the court refused to give, and instead gave substantially its converse, in the following terms: "It is not disputed, that a short time before Elliott was killed, he had a quarrel in Doorley's saloon with one William Eakin, and knocked him down. That was a violation of of one of the ordinance of Hillsborough. The facts that Eakin called him a liar was no justification in law for knocking him down. If you find from the evidence that within a short time after this occurred as soon as possible after it occurred — Lewis was sent for to arrest Elliott; that Lewis, as marshal of the town, went at once in pursuit of Elliott; that Elliott, on seeing Lewis approach, started to leave the town in a hurried manner; that Lewis pursued him—then I charge you that Lewis, upon overtaking Elliott, had the lawful right to arrest him, notwithstanding he had no warrant for the purpose."

To the charge as given, and to the refusal to charge as requested, the prosecuting attorney excepted, and embodying them in a bill of exceptions, has brought them to this court for review, by virtue of sections 7305, 7306, Revised Statutes.

That the defendant was marshal of the village of Hillsborough, did not witness the affray, nor procure from a magistrate a warrant for the arrest of the deceased, are conceded facts. In addition to this, the testimony given in behalf of the State tended to prove that the deceased had participated in an affray in a saloon within the village of Hillsborough, on the day of the homicide; that the defendant was absent, and did not hear or see any part of the affray; that a few minutes thereafter be received information that a breach of the peace had been committed, and at once went to the saloon where it had occurred; that when he reached the saloon the parties to it had gone, and good order had been restored; that upon inquiry the defendant was told that an affray had been committed, in which the deceased had participated and ascertaining the direction taken by the deceased, the defendant, without obtaining a warrant, immediately pursued, soon after overtook and proceeded to arrest him for that offense; that the deceased, though having knowledge of the official character of the defendant, resisted the arrest, and in the resulting struggle was shot and killed by the defendant.

The authority of peace officers to arrest without a warrant from a magistrate is a subject that has received the attention of courts and text-writers from an early period in the history and development of the common law in both England and America. Some of the earlier English authorities while the prerogatives of the government were more highly considered than at a later day, maintained the power. 2 Hale P. C. 90. But even then the doctrine met with a resistance which finally overturned it. 1 East P.C. 305; Reg.v. Tooley, 2 Ld. Raym. 1301, where Lord Holt, in delivering the opinion of the majority of the court, is reported as saying: "The prisoners in this case had sufficient provocation; for, if one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people out of compassion; much more where it is done under a color of justice, and where the liberty of the subject is invaded it is a provocation to all the subjects of England. He said that a constable cannot arrest but when he sees an actual breach of the peace, and if the affray be over, he cannot arrest." See also 2 Hawk, P. C. chap. 13,§ 8. The later English authorities seem to settle the law there in accordance with the views of Lord Holt. Coupey v. Henley, 2 Esp. 540; Baynes v. Brewster, 2 Adol.& El. (N. S.) 375; Reg. v. Mabel, 9 Car. & P. 474; Timothy v. Simpson, 1 Cronmp., M. & R. 757; Grant v. Moser, 5 Man. & G. 123; 1 Russ. Crimes (8th ed.), 410, 805; Cook v. Nethercote 6 Car. & P. 741. Alderson, B., in that case, in summing up, saying: "If however, there had been an affray, and that affray was over, then the constable had not, and ought not to have, the power of apprehending the persons engaged in it; for the power is given him by law to prevent a breach of the peace, and where a breach of the peace had been committed, and was over, the constable must proceed in the same way as any other person, namely, by obtaining a warrant from a magistrate." Cook v. Nethercote, 6 Car. & P. 744. The American authorities establish the same rule. Roberts v. State, 14 Mo. 138; People v. Haley, 48 Mich. 495; Phillips v. Trull, 11 Johns. 486; Pow v. Beckner, 3 Ind. 475; 1 Bish. Crim. Proc. 183, 184; Quinn v. Heisel, 40 Mich. 576; *In re* Way, 41 *Id.* 299; Com. v. Carey, 12 Cush. 246.

This court has held that a city council may

lawfully authorize police officers to arrest upon view any person found in the act of violating the ordinances of the city, made for the preservation of good order and public convenience (White v. Kent, 11 Ohio St. 550); also that the officer, in making arrest upon view, is not bound to disclose his official character (Wolf v. State, 19 *Id.* 248); and that it is lawful to arrest, without warrant, one who is unlawfully carrying a concealed weapon, though the officer had no previous knowledge of the fact, if he acted *bona fide* upon knowledge which induced an honest belief that the person was violating the law in this respect. Ballard v. State, 43 Ohio St. 340.

But the facts in those cases disclose that the person arrested was taken while in the act of committing the offense for which he was apprehended, while in the case under consideration the evidence tended to show that the defendant acted upon information only, and that the affray was over, and public order restored, before he attempted to pursue or arrest the supposed offender. The section of the Revised Statutes that defines the powers of marshals within the municipalities of the State reads as follows: "Section 1849, R. S. He shall suppress all riots, disturbances and breaches of the place, and to that end may call upon the citizens to aid him; he shall arrest all disorderly persons in the corporation, and pursue and arrest any person fleeing from justice in any part of the State; he shall arrest any person in the act of committing any offense against the laws of the State or the ordinances of the corporation, and forthwith bring such person before the mayor or other competent authority for examination or trial; and he shall receive and execute any proper authority for the arrest and detention of criminals fleeing or escaping from other places or States."

This section imposes on the marshals of our municipalities important public duties, and clothes him with extensive powers in respect to their discharge. He is, by the terms of this section among other duties which it enjoins, required to "pursue and arrest any person fleeing from justice in any part of the State;" but whether with or without warrant, the section is, in terms, silent. He is thus clothed with authority throughout the whole State, which but for the statute under consideration, would be limited to his municipality. What is found in the other language of this statute that indicates a legislative purpose to dispense with a warrant in cases where, according to the principles of the common law, or by other statutory provisions, one would otherwise be necessary? We can discover nothing. Statutes of this clsss, though enacted in the interests of the public order, yet derogate from the liberty of the citizen, and if not strictly construed, which the weight of authority seems to hold they should be, yet are not to be extended by a loose or liberal construction. Bish. Crim. Proc. 184; Ramsey v. Foy, 10 Ind. 493; State v. Dale, 3 Wis. 797.

The authority should be limited to the necessity for its exercise. Where an affray is in progress, or an offense in the course of commission, in the presence of an officer, his duty is to prevent its continuance or completion. To accomplish this effectually the power to at once apprehended the offender is necessary. Under such circumstances, to stay his hand until a warrant could be obtained would paralyze his power to present crime and maintain the public peace. So perhaps the legality of an arrest without warrant might be maintained where the affray or other misdemeanor had already been completed when the officer appeared, if the offender was present, and public order had not yet been completely restored. Where, however, the offense is an accomplished facts, its prevention is no longer possible, and if public order has been fully restored before the officer appears, the power to arrest without warrant for a mere breach of the peace or other minor offense is no longer necessary; for the end— to maintain the public peace— for which such authority is given is no longer attainable. Even where such an offense has been committed in the presence of an officer, his power to arrest the offender without warrant should be promptly exercised or it will be lost. 1 Am. & Eng. Enc. Law, 784; Queen v. Marsden, L. R., 1 Cr. Cas. 131; Clifford v. Brandon, 2 Camp. 371. In one case it was held that the officer must proceed at once in the matter, and follow it up until the arrest is accomplished, and a delay of five hours was fatal to the authority. Wahl v. Walton, 30 Minn. 506.

In Reg. v. Walker, Dears. Cr. Cas. 358, two hours had elapsed before the arrest was attempted; and the court for hearing reserved crown cases, speaking by Pollock, C. B., said: "We are of opinion that the apprehension was not lawful. The assault for which the prisoner might have been apprehended was committed at another time, and at another place. There was no continued pursuit of the prisoner." Reg. v. Walker, Dears. Cr. Cas. 359. In Meyer v. Clark, 41 N. Y. Super. Ct. 107, an interval of a few minutes, where the officer in the meantime had gone away, and made the arrest on his return, rendered it illegal.

The authorities establish the rule that the powers of peace officers to arrest without warrant for a mere misdemeanor should be made as definite and certain as may be consistent with an efficient discharge of his duty to maintain public order, and extend no further then than may be necessary to that end. Where he acts upon view, he is required to act promptly. This may introduce an element of indefiniteness, for whether he is prompt or not must depend to some extent upon the circumstances in which he is placed. This, however, is unavoidable, unless it should be held that he must act at once or loose the power to arrest; and this degree of promptness, it seems, is not required. Taylor v. Strong, 3 Wend. 384; Shanley v. Wells, 71 Ill. 78; 1 Am. & Eng. Enc.

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Law, 737. However, to extend his power of arrest in the class of offenses under consideration so as to authorize him to act solely upon information obtained from third persons, not only as to whether an offense had been committed, but also as to the person who had committed it, is not only unnecessary to unable him to preserve public order, but would render still more indefinite and uncertain the extent of his authority. How soon after the offense had been committed should the information be communicated, to authorize the officer to act without the sanction of a warrant, and how soon thereafter must he proceed to make the arrest? A satisfactory answer to these questions is not readily found. If such power was absolutely necessary to preserve the public peace, an objection to it, founded upon its extent and uncertainty, should yield to that necessity; but it may well be doubted whether this power of apprehension for a mere misdemeanor, upon information only, and without warrant in view of the temper and notions of our people in regard to their personal rights, and the opinion, so often however unjustly entertained by the public, respecting the discretion of a large class of peace officers, would not tend to disturb, rather than promote the public peace. We think, therefore, the statute under consideration, even if it stood alone should not be construed to authorize a marshal of a city or village to arrest without warrant for a mere misdemeanor not committed in his presence.

The section (1849, R. S.) under consideration, however, does not stand alone. The general assembly, by section 7129, Revised Statutes, has spoken upon this subject. That section (7129) provides that "a sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or police officer shall arrest and detain any person found violating any law of this State, or any legal ordinance of a city or village, until a legal warrant can be obtained. This section and section 1849, Revised Statutes, which has been under consideration, are *in paria materia*, and should be construed together, as well as in reference to the established rules of the common law. The general assembly, by section 7129. Revised Statutes, must be deemed to have prescribed the rule relating to the subject it was then, considering, namely, the circumstances under which an arrest may be made without warrant, while by section 1849, Revised Statutes it prescribed the general duties and powers of marshal of our cities and villages; and as there is no inconsistency between the two, neither statute should be regarded as conflicting with the other, but if there were such conflict, each should be deemed paramount in respect to the particular subject to which it specially relates. Section 7129, Revised Statutes, provides for the arrest of persons "found violating" a law or ordinance. Found by whom? The statutes does not expressly declare, but when the rules of the common law upon this subject are considered, it is clear that the legislature meant, found by the officer who attempts to make the arrest.

Exceptions sustained.

NOTE.—Whatever may have been the theory of the common law, many of the restrictions of the power to arrest are of comparatively modern enunciation. On the question involved in this case, some uncertainty has arisen, due to a conflict between the actual practice of an age, jealous of prerogative and careless of minor privileges, and the tendency of courts at a later period to assert revived claims of privilege as part of the common law.

The authority of a peace officer to arrest without warrant for a felony though not committed in his view has never been questioned. Samuel v. Payne, Doug. 359; Bennett & Heard's Leading Cases, 194. The inference of a right of arrest under like circumstances in case of misdemeanor is based upon a dictum of Lord Hale in his text-book, "Pleas of the Crown," star page, § 88 *et seq.* He bases the right upon (1) the officer's right to take the offender before the justice to give security; (2) the officer's right to prevent the commission of a threatened breach of peace. The only case he refers to is Sharrock's Case, Crb. Eliz. 375, in which the court divided evenly. The first ground set forth by Lord Hale is not now generally entertained. Upon a misconception of the authority of the second is based such case-law as favors the broader claims of the power of arrest. For, following Regina v. Tooley, 2 Ld. Raym. 1301 (decided by Holt), the current of authority has been adverse to the power of a peace officer to arrest without warrant for a misdemeanor committed out of view. But in cases where it appears that a breach of the peace is still threatening, there is a clash of opinions.

There may be a continuity of action which will relate back to the incipience and authorize an arrest as of view. If there exists such continuity, the officer may arrest, even though some time has elapsed since he witnessed the offense, and even if he witnesses merely the minor concluding incidents, if the continuity of action is not broken. Notwithstanding Lord Hale's dictum and some decisions based upon it, it is conceived that the mere apprehension on the part of the officer of a renewal of the offense will not justify an arrest without warrant. Public peace will be less endangered by the delay incident to an application for a warrant, than by the exercise of *quasi*-judicial discretion by the ordinary peace officer. The case of Regina v. Walker, 1 Dears C. C. 358, arose upon an arrest made two hours after an affray. Pollock, C. B., held the arrest illegal, because there was a lack of continuity. Parke, B., however, placed it upon the ground of there being no danger of renewal. In Baynes v. Brewster, 11 L. J. M. C. 5, sometimes deemed authority for the broader claim of power, the judges separately stated that the "plea" they were called to pass upon left them in doubt as to the facts of the case. In this condition of affairs several tentative opinions were expressed which, under the circumstances, are not of great authority. In Regina v. Light, Dears & B. C. C., 332, a policeman saw defendant threatening his wife with a shovel, and heard him say he would split her head but for the officer's presence. The defendant left the house, as he said, never to return. An arrest twenty minutes thereafter was upheld, on the ground of danger of a renewal of the offense. As far as the evidence goes, defendant left the house for good, so that it seems hard to agree with the reasoning of the decision. In Rex v. Bright, 4 C. & P. 387, defendant was

making a disturbance before a house, but when the officer arrived was quiet, and merely said, "if a light appears at the window I will break every one of them." The arrest was there held illegal, though if danger of renewal is authoritative, it was clearly called for. In Wheeler v. Whiting, 9 C. & P. 262, Patterson, J., summing up in an action for wrongful arrest, told the jury that he did not regard the plea of an intended breach of peace good in law, and that he "had never heard of such a plea." However, that may be in Price v. Seely, 10 Clark & Finnelly (House of Lord's), 28, the right to arrest without warrant for a misdemeanor committed out of view was affirmed, even in private persons, where there is a present threatened breach of peace. On the whole it may be said that the English law on the subject is in confusion, and that while some opinions seem to justify an arrest by an officer for a misdemeanor committed out of view, on apprehension of an impending breach of peace, the position is by no means safe from future assault.

In America the law is on the other hand more positive. In Knot v. Gray, 1 Root (Conn.), 66, an early case, the right to arrest to prevent a breach of the peace was affirmed. In State v. Brown, 5 Har. (Del.) 507, the court affirms the right of a peace officer to arrest "without warrant a person concerned in a breach of the peace or other crime, when he has reasonable grounds to suspect the party of such offense." This never was law. In State v. Sims, 16 S. C. 486, an arrest made by an officer who arrived after the defendant had become quiet was sustained by the court who anxiously announced in italics that the decision is limited to "*this case.*" Also, in Main v. McCarty, 15 Ill. 441, the right to arrest without warrant "after peace is restored," is supported. The later authorities of that State are not in harmony with the opinion. See Shanley v. Wells, 71 Ill. 78. With these exceptions the decisons positively deny the right of arrest without warrant for a misdemeanor committed out of view. The right to arrest on fear of a renewal of a breach of peace is not acknowledged, and as the judge in the present case well says, "is opposed to the temper and notions of our people in regard to their personal rights." In addition to the cases cited in the opinion, these views are asserted in Scott v. Elridge, 15 S. E. Rep. 554; People v. Johnson, 86 Mich. 175; People v. McLean, 36 N. W. Rep. 231; Commonwealth v. Wright, 33 N. E. Rep. 82; Shanley v. Wells, 71 Ills. 78; Sternack v. Brooks, 7 Daly (N. Y.), 142; Wahl v. Walton, 30 Minn. 506; State v. Davidson, 44 Mo. App. 513.

An accurate statement of what, in the writer's opinion, is the law of the question is found in Quinn v. Heisel, 40 Mich. 576. "There are many loose statements in the books as to the right of officers to make arrest without warrant. A threat or other indication of a breach of the peace will not justify an officer in making an arrest unless the facts are such as would warrant the officer in believing an arrest necessary to prevent an immediate execution of the threat, as where a threat is made, coupled with some overt act, in attempted execution thereof. To justify such an arrest the party must have gone so far in the commission of the offense that proceedings might thereafter be instituted against him therefor, without reference to any past offense of which he may have been guilty before the officer arrived."

ADOLPH WISLIZENUS.

CORRESPONDENCE.

To the Editor of the Central Law Journal.

JOINT TORT-FEASORS — CONTRIBUTION — VIRGINIA LAW.

I notice your allusion to Vandiver v. Pollock, on subject of contribution by joint tort-feasors, on page 408, of the current volume. The right of contribution as between joint tort-feasors is a question seldom arising, but was adjudicated in Virginia in the case of Thweatt's Admr. v. Jones' Admrs., 1 Rand. 328. Contribution is always denied to parties in *pari delicto*, and generally to joint tort-feasors. The policy and reasoning of the law in refusing its aid to enforce contribution among wrong-doers, is that they may be intimidated from committing the wrong, by the danger of each being made responsible for all the consequences. But this reasoning cannot apply to torts or injuries arising from mistakes on accident or involuntary omission in the discharge of duties, and there are exceptions to the general rule denying contribution to joint tort-feasors, when their wrongs do not proceed *ex maleficio*, or from some actual fraud, or voluntarily.

The case of Thweatt's Admr. v. Jones' Admrs., is an illustration of the exception to the general rule, and Judge Green, in delivering his opinion therein, said: "Contribution is not due by reason of any contract, express or implied. But when any burthen ought: from the relation of the parties, or in respect of property held by them, to be equally borne, and each party is in *aequali jure*, contribution is due, unless the claim to contribution has arisen out of some actual fraud or voluntary wrong, in which the party claiming contribution has participated, the mere nonperformance or violation of a civil obligation is not such a wrong as will condemn a claim to contribution. The act which precludes a party from the right to claim contribution from those who were equally liable to the burthen as himself, must be *malum in se*, as actual fraud or voluntary wrong." . . . "Where parties are equally bound to bear a burthen, and are in *æquali jure*, that is liable, from the same circumstance existing as to both, contribution is due of right in equity: that this general proposition is liable to one exception, namely, that the party who would otherwise be entitled to such contribution forfeits such right: if the joint liability arose from an act *malum in se*, a fraud or voluntary tort in which he participated." BENJ. WATKINS LEIGH.

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1. ADMIRALTY—Charter Party—Lien on Cargo.—The provision of a charter party gave the ship owners a lien "on all cargoes and all subfreights for any amounts due under this charter." The vessel was subchartered by similar charter, and claimant shipped certain cargo for which bills of lading, fixing the freight due, were given by the ship. Claimant having paid to the subcharterer the freight due on the cargo, held, that the ship could not hold the cargo for the unpaid charter money.—THE ALBERT DUMOIS, U. S. D. C. (N. Y.), 54 Fed. Rep. 529.

2. ADMIRALTY — Shipping — Authority of Master.—A master may punish a seaman who refuses to do his duty, and may, if the seaman is incorrigible, discharge him, confine him, or deprive him of privileges; but forfeiture of wages cannot be superadded to corporal punishment, and it is not within the ordinary powers of a master to imprison a sailor on shore.—THE STACEY CLARKE, U. S. D. C. (Ala.), 54 Fed. Rep. 533.

3. ADMIRALTY — Shipping—Charter Party.—The provision in a charter party that the vessel chartered shall proceed to port of loading "with all convenient speed" is equivalent to a contract that she shall proceed without unnecessary delay, and implies an agreement that it shall be without unreasonable delay, and these are conditions precedent.—OLSEN V. HUNTER-BENN & CO., U. S. D. C. (Ala.), 54 Fed. Rep. 530.

4. ADVERSE POSSESSION—What Constitutes—Possession by Tenant.—Possession by a lessee is continuous, peaceable, adverse possession, in favor of the lessor, as against third persons, within Rev. St. Tex. art. 3193, making such possession for five years a bar to recovery of real estate, although the lessee repudiates the tenancy, and attorns to a third party, where the lessor institutes suit against the lessee, and recovers possession therein.—COYLE V. FRANKLIN, U. S. C. C. of App., 54 Fed. Rep. 644.

5. APPEAL—Decree.—Where the appellate court reverses a judgment rendered upon an account embracing many items, with directions to the lower court to disallow only one of said items, such reversal is a final judgment, from which an appeal to the supreme court will lie.—HENNING V. ELDRIDGE, Ill., 33 N. E. Rep. 754.

6. APPEAL—Filing Record.—Sess. Laws 1887, No. 174, which requires an appellant from the decision of the probate court to file the record in the circuit court within 30 days after taking the appeal, and which declares that, "on his failure so to do, such appeal shall cease to be of effect, and that the order or decree appealed from shall stand as though such appeal had not been taken," is a mandatory statute; and where the record is not filed within the required time the appeal should be dismissed, on appellee's motion, though it is filed after the making of the motion, and before the hearing.—MERRIMAN V. JACKSON CIRCUIT JUDGE, Mich., 54 N. W. Rep. 871.

7. APPEAL—Sufficiency of Recognizance.—Where the recognizance on appeal recites that appellant stood charged with the offense of malicious mischief, and had been convicted of that offense, the appeal will be dismissed on motion, because the recognizance states no specific offense.—ALDERETE V. STATE, Tex., 22 S. W. Rep. 17.

8. ASSIGNMENT OF WAGES—Validity. — Defendant, an employee of garnishee railroad company, directed an order to garnishee's auditor, the address being "E. Young, Auditor," asking him to pay to a designated person defendant's salary during the next seven months, and garnishee accepted the order, and paid a part of the salary: Held, that the order, having been accepted and acted on by garnishee, though not directed to garnishee or to its auditor as an officer of garnishee, operated as an assignment.—METCALF V. KINCAID, Iowa, 54 N. W. Rep. 867.

9. ASSIGNMENT—What Constitutes.—To constitute an equitable assignment of property, there must be an appropriation or separation, and the mere intent to appropriate is not sufficient.—PUTNAM SAV. BANK V. BEAL, Mass., 54 Fed. Rep. 577.

10. ATTACHMENT—Indemnifying Bond.—An officer in whose hands an attachment is placed to be levied upon goods of the debtor in the action may, where there is doubt as to ownership of the goods, demand an indemnifying bond from the plaintiff in the attachment.—MIHALOVITCH V. BARLASS, Neb., 54 N. W. Rep. 826.

11. ATTORNEY AND CLIENT—Contingent Fee.—Where an attorney and client agree that the fee in a pending suit shall be fixed by a referee, and award made after a successful termination of the suit by an experienced master familiar with the litigation, and confirmed by the court, will not be disturbed as excessive on appeal, unless in justice clearly appears; especially when it was probably the intention that the fee should be contingent on success.—WHITNEY V. CITY OF NEW ORLEANS, U. S. C. C. of App., 54 Fed. Rep. 614.

12. ATTORNEY'S LIEN—Judgment.—Where an attorney recovers judgment against a client for services in a suit, the lien which the attorney has on the papers in his hands pertaining to such suit, or on any judgment which has been rendered therein, is lost by his judgment.—JONES V. MUSKEGON CIRCUIT JUDGE, Mich., 54 N. W. Rep. 876.

13. BAILMENT — Sale by Bailee.—An innocent purchaser of property from a bailee for hire acquires no title, and on disposing of the property is liable to the bailor for its value.—HENRY F. MILLER & SONS' PIANO CO. V. PARKER, Penn., 26 Atl. Rep 303.

14. BASTARDY — Examination of Defendant.—How. St. § 2005, relating to bastardy proceedings, provides that a justice of the peace may issue his warrant against the party accused, and, after hearing him, may require him to enter into a recognizance for his appearance at the circuit court: Held, that the pendency of prior bastardy proceedings, on complaint of the same complainant, and for the same cause, was no bar to an examination on a second complaint.—PEOPLE V. HAMILTON, Mich., 54 N. W. Rep. 874.

15. BOUNDARIES — Estoppel — Acquiescence.—The owner of a lot, upon part of which his neighbor has erected a building, is not estopped from asserting title to such part by the fact that he allowed the building to be erected without objection, where it appears that he honestly believed that his neighbor knew the correct location of the boundary between their lots.—MULLANEY V. DUFFY, Ill., 33 N. E. Rep. 750.

16. CARRIERS—Passenger.—Railroad companies may require passengers to purchase tickets before taking passage on trains, and, in case facilities for so doing are provided, those not purchasing may be required to pay an extra fare on the train.—SAGE V. EVANSVILLE & T. H. R. CO., Ind., 33 N. E. Rep. 771.

17. CARRIERS OF PASSENGERS—Elevators.—A landlord who runs an elevator for the use of his tenants and their visitors thereby becomes a common carrier, and is charged with the highest degree of care which human foresight can suggest, both as to the machinery and the conduct of his servants; and an instruction that he owes to persons thus put completely under his control "the highest degree of care consistent with the possibility of injury," while unfortunate in the choice of words, does not misstate the law, and, being explained by the context, is no ground for reversal.—MARKER V. MITCHELL, Ohio, 54 Fed. Rep. 637.

18. CARRIER OF PASSENGERS—Negligence.—In an action against a railroad company for personal injuries caused by the sudden motion of defendant's train while plaintiff was alighting therefrom, after being carried past the station to which he had paid his fare,

without fault on his part, it is not error to charge that the law requires a railroad, in transporting passengers, to use the highest degree of practical care, diligence, and skill that is consistent with that mode of transportation, for the protection of passengers from injury.—ATCHISON, T. S. F. RY. CO. v. FRIER, Tex., 22 S. W. Rep. 6.

19. CARRIERS OF PASSENGERS—Sleeping Cars—Ejectment of Passenger.—Where an unlawful expulsion from a berth of a sleeping car is the proximate cause of a married woman's miscarriage, the sleeping-car company is liable for such injury, although its servants were ignorant of the woman's condition when they expelled her.—MANN BOUDIOR CAR CO. v. DUPRE, U. S. C. C. of App., 54 Fed. Rep. 646.

20. CARRIERS OF PASSENGERS—Street Railways—Negligence.—It is not negligence, *per se*, for a passenger in a street-railway car operated by electricity according to the "trolley" system to rest her arm upon the sill of an open window.—SCHNEIDER v. NEW ORLEANS & C. R. R., U. S. C. C. (La.), 54 Fed. Rep. 466.

21. CONSTITUTIONAL LAW—"Compact" between States.—The mere selection of parties to settle a boundary line between two States, and a legislative adoption of their report by one of the States, does not amount to a "compact" or "agreement" between States, which they are forbidden by the constitution to make without the consent of congress, until the one State has adopted the report in consequence of its adoption by the other, nor even then unless the boundary established leads to the increase or decrease of the political power or influence of the States affected.—STATE OF VIRGINIA v. STATE OF TENNESSEE, U. S. S. C., 13 S. C. Rep. 728.

22. CONSTITUTIONAL LAW — Interstate Commerce — Taxing Railroad's Business. — A railroad company, whose only business within the State is discharging freight and passengers brought over its line from without the State, receiving freight and passengers to be sent out over its line, and maintaining terminal facilities, such as wharves and piers, and buildings in connection therewith, and the employment of agents, clerks, and laborers, is not subject to a tax on its "corporate franchise and business," under Laws 1880, ch. 542, and acts amendatory thereof; such business being interstate commerce.—PEOPLE v. WEMPLE, N. Y., 33 N. E. Rep. 720.

23. CONSTITUTIONAL LAW — Jurisdiction of United States.—The clause in the federal constitution (article 1, § 8, cl. 17) giving the United States exclusive jurisdiction over all places purchased by the consent of the legislature of the State in which the same shall be for the erection of forts, arsenals, etc., has only the meaning of an acquisition of land by actual purchase accompanied by a cession of jurisdiction by the State; and where land is acquired by the United States directly from the State as owner by an act of cession (as in the case of Fortress Monroe), the constitutional provision does not apply, and the United States holds the land only by the tenure prescribed in the act of cession.—CROOK, HORNER & CO. v. OLD POINT COMFORT HOTEL CO., U. S. C. C. (Va.), 54 Fed. Rep. 604.

24. CONTEMPT—Punishment.—How. St. § 7235, which provides that punishment for contempt may be by fine not exceeding $250, or by imprisonment not exceeding 30 days, or both, at the discretion of the court, and that any one committed to prison on the non-payment of any fine shall be discharged at the expiration of 30 days, does not authorize the imposition of a fine, to be paid within a time specified, and, in default of payment within the required time, to imprisonment for a certain number of days, since the offender is entitled to his discharge at any time on the payment of the fine.—IN RE SLOMAN, Mich., 54 N. W. Rep. 869.

25. CONTRACTS — Breach — Remedies.—A party to a contract, who is prevented or excused from fully performing it by the conduct of the other party, may treat the contract as broken, and sue, at his election, either for damages and loss of profits, or for the value of services already performed, as upon a *quantum meruit*.—MCELWEE v. BRIDGEPORT LAND & IMPROVEMENT CO., U. S. C. C. of App., 54 Fed. Rep. 627.

26. CORPORATION — Mortgage. — Where a deed or mortgage purporting to have been executed by a corporation is signed and acknowledged in its behalf by the president and secretary thereof, with the corporate seal attached, the presumption is that it was executed by authority of such corporation, and the burden of proof is upon one who denies such authority.—GORDER v. PLATTSMOUTH CANNING CO., Neb., 54 N. W. Rep. 830.

27. COVENANTS—Building Restrictions.—A clause in a deed of a lot prohibiting the erection thereon of any buildings other than dwellings with necessary outbuildings, such dwellings to cost not less than $2,000, is violated by placing a tent on the lot, costing less than that sum, and used by the grantee and his family as a dwelling in the summer time, though they do not sleep therein. — BLAKEMORE v. STANLEY, Mass., 33 N. E. Rep. 689.

28. CRIMINAL EVIDENCE — Carrying Weapons.—On a prosecution of defendant for carrying a pistol, evidence that, during a dispute with a person, he presented a pistol at him, is admissible as *res gestæ;* being a part of the same transaction, and occurring at the same time.—O'NEAL v. STATE, Tex., 22 S. W. Rep. 25.

29. CRIMINAL LAW—Adulteration of Milk. — Cream to which boracic acid has been added is within Pub. St. ch. 57, § 5, which makes it an offense to have in one's possession with intent to sell "milk" to which a foreign substance has been added; "milk" being used as a general term, and in a sense broad enough to include cream.—COMMONWEALTH v. GORDON, Mass., 33 N. E. Rep. 709.

30. CRIMINAL LAW—Confessions.—A merchant whose goods had been stolen sent word to defendant that the merchant's wife and a boy in the store had seen him take the goods, and that it would be better for him to come in, and tell what he got; and pay for them, or he would be prosecuted. Defendant went to the merchant's store, and confessed he had taken goods to a certain value, and paid for them. The message sent to defendant was untrue, and, outside of defendant's statement, the merchant was unable to identify the kind or value of the goods stolen: Held, that the confession was not voluntary, and inadmissible.—COOK v. STATE, Tex., 22 S. W. Rep. 23.

31. CRIMINAL LAW—Disorderly Conduct.—Under Pen. Code, art. 313, providing that, if two or more persons shall fight together in a public place, they shall be punished by fine, it is no justification to a person committing such offense that he did not strike the first blow, where he used rough and insulting language toward his opponent, and, though reluctantly, entered the combat with some zeal, and was vigorous in his efforts during the fight. — POLLOCK v. STATE, Tex., 22 S. W. Rep. 19.

32. CRIMINAL LAW—Gaming—Constitutional Law.—A statute prohibiting banking games is not unconstitutional because it fails to describe such game. On appeal in a criminal case, where the statement of facts adduced on the trial is not incorporated in the record, it will be presumed that the evidence was sufficient to authorize the judgment.—EVANS v. STATE, Tex., 22 S. W. Rep. 18.

33. CRIMINAL LAW—Theft.—In a prosecution for theft, under Pen. Code, art. 745, subd. 2, providing that, to constitute such offense, it must be committed so suddenly as not to allow time for resistance before the property is carried away, a charge that the property must have been taken so suddenly as not to allow time for the person from whom the property is stolen to resist, and prevent the taking of such property from his person, is not objectionable because the word "prevent," in the latter clause of the charge, is not in the statute, and such charge was, as to the last clause thereof, beneficial to defendant. — BROWN v. STATE, Tex., 22 S. W. Rep. 24.

34. CRIMINAL PRACTICE—Grand Jury—Indictment.—Under Crim. Code, div. 11, § 10, which declares that no

grand juror shall state how any member of the jury voted, the affidavits of grand jurors ought not to be received for the purpose of showing that 12 of their number did not concur in finding an indictment that has been indorsed "A true bill" by their foreman, especially where objection to the indictment on that ground is not made till after trial.—GITCHELL v. PEOPLE, Ill., 33 N. E. Rep. 757.

35. CRIMINAL PRACTICE—Perjury.—An indictment for perjury must aver the facts showing the falseness of the oath and its materiality to the proceeding in which it was taken.—UNITED STATES v. SINGLETON, U. S. D. C. (Ala.), 54 Fed. Rep. 488.

36. CRIMINAL PRACTICE—Swindling.—An indictment for swindling, which sets forth that defendant, representing himself to be the owner of certain chattels, promised to give a lien thereon, and thereby obtained other chattels, is good, though it fails to aver that such lien was executed, in that, if he represented himself to be the owner of property, thereby inducing another to part with his property, and such representations were false, he would be guilty, and it would be immaterial that he did not, as he promised, execute the lien.—BROWN v. STATE, Tex., 22 S. W. Rep. 22.

37. CRIMINAL TRIAL — Competency of Juror.—On his *voir dire* a juror stated that he had formed an opinion which it would require evidence to remove, but it was not such as would influence his verdict. On being examined further by the court he stated his opinion was formed from hearsay and newspaper reports, but he could give defendant as fair and impartial a trial as if he had read and heard nothing of the case: Held, that the juror was competent, and that there was no abuse of judicial discretion in impaneling him.—REED v. STATE, Tex., 22 S. W. Rep. 22.

38. DAMAGES—Instructions — Failure to Deliver Telegraph Message — Mental Anguish. — A telegraphic message, showing on its face to be of peculiar importance and urgency, was addressed to plaintiff, "Vandalia Freight Yards, Terre Haute, Ind.:" Held, in the absence of any showing that such freight yards are a public place at which mail and telegraphic messages are received by persons having business with the railroad company, that it became the duty of the telegraph company, on being informed that no such person as plaintiff was employed or known about the yards, to make further effort to find him, instead of leaving the message with the yardmaster; and, where plaintiff's whereabouts could have been easily ascertained by consulting the city directory or inquiring at the post office, the company is liable to plaintiff for non-delivery of the message. — WESTERN UNION TEL. CO. v. NEWHOUSE, Ind., 33 N. E. Rep. 800.

39. DEED — Recital. — A recital in a deed of recent date, that the grantors are the heirs at law of a former owner of the lands therein described, is not sufficient evidence, as against a stranger to the instrument, of the death of the supposed ancestor, or that the persons who executed the deed are his heirs. — MCMURTRY v. KEIFNER, Neb., 54 N. W. Rep. 844.

40. DESCENT OF REAL PROPERTY—Second Marriage.—Rev. St. § 2484, provides that if a widow shall marry a second or subsequent time, holding real estate in virtue of any previous marriage, the real estate shall, on her death, go to her children by the marriage in virtue of which the real estate came to her, if there be such children: Held, that the statute applies to such real estate of a former husband as descends to and is vested in the widow by operation of law, but does not apply to real estate devised by a former husband in fee to the widow, in lieu of her interest in his estate, since she would hold such real estate by purchase, and not by operation of law.—ALLEN v. BLAND, Ind., 35 N. E. Rep. 774.

41. EMINENT DOMAIN — Condemnation Proceedings—Non-resident.—The word "non-resident," in section 100, ch. 16, Comp. St., relating to condemnation proceedings for right of way for a railroad, means a non-resident of the State, and not of the land affected, or of the county where it is situated.—PACIFIC RY. CO. v. PERKINS, Neb., 54 N. W. Rep. 845.

42. EMINENT DOMAIN—Servitude of Riparian Lands.—Const. La. 1879, art. 156, providing that private property shall not be taken or damaged for public purposes without compensation, has no application to the location of a levee on land by the proper authorities, for such location makes the land "riparian," although it is not actually washed by the river, within the meaning of Civil Code, § 457, which provides that "on the borders of the Mississippi and other navigable streams, where there are levees established according to law, the levees shall form the banks," and as such it is subject to the servitude of having a levee placed upon it without compensation to the owner.—HART v. BOARD OF LEVEE COM'RS FOR PARISH OF ORLEANS. U. S. C. C. (La.), 54 Fed. Rep. 559.

43. EQUITY—Creditors' Bill.—A person having a claim for unliquidated damages arising out of fraud in a sale against a corporation which has sold its assets, distributed its corporate funds among its stockholders, and suspended business, but which had not been legally dissolved, cannot maintain a suit in equity in a federal court against a portion of the stockholders to subject to his claim the assets so received by them without making the corporation itself a party; and the fact that it has no officers or agents upon whom personal service can be made is immaterial when, by the statutes of the State of its incorporation (Nebraska) a method is provided whereby it can be brought into court.—SWAN LAND & CATTLE CO. FRANK, U. S. S .C., 13 S. C. Rep. 691.

44. EQUITY—Pleading.—A bill in equity by a legatee to reach assets of an estate converted by an executor, and transferred to a bank, which alleges that a oratrix sues in her own right, and as an assignee of other legatees named, and that the executor had paid a large number of legacies, and a large number remain unpaid, fails to allege an assignment, or that the legacies of complainant or the assignors have not been paid, and hence states no ground of action.—SOWLES v. FIRST NAT. BANK, Vt., 54 Fed. Rep. 564.

45. EVIDENCE—Parol Evidence.—In an action to foreclose a mortgage the answer alleged that defendant was a married woman when the debt was incurred; that the loan was made for her husband's benefit, that the notes and mortgages were executed by her as surety for her husband; and that the mortgagee had relied for his security, not on the mortgage, but on a third person's indorsement of the note: Held, that parol evidence was admissible in behalf the mortgagee to show that the third person had signed his name on the back of the note, not as indorser, but as a witness to the transaction.—TOMBLER v. REITZ, Ind., 33 N. E. Rep. 789.

46. EVIDENCE—Tax Duplicate and Receipts.—In an action involving the value of land the tax duplicate is not admissible as a declaration made by the tax payer, since such duplicate is not a copy of the original list made by him, nor is it a record made by him or at his direction.—SWAIN v. SWAIN, Ind., 33 N. E. Rep. 792.

47. EXECUTORS—Trustees.—The beneficiary of a permanent fund intrusted by a will to the executor, with sole and exclusive power of investment, and not made a charge upon any property, cannot follow into the hands of a third person property derived from the estate, which the executor transferred in his individual capacity after a decree of the probate court on settlement of the accounts, ordering payment of this and other legacies.—ST LUKE'S CHURCH v. WITTERS, Vt., 54 Fed. Rep. 567.

48. EXEMPTIONS—Pleading—Set-off.—A debtor, plaintiff in an action on a note, and whose property does not exceed $600, may claim such note as exempt against a note pleaded as a set-off to his note, and may do this by way or reply to the answer of set-off.—COFFING v. DUNGAN, Ind., 33 N. E. Rep. 815.

49. EXPERT WITNESS— Competency.— The qualification of a witness who is not a scientific expert, but who has had special opportunities for observation in

the particular case, to give his opinion as to the effect of a railway bridge and embankment in causing overflows of a river is a matter within the discretion of the trial judge, and his ruling thereon will not be disturbed unless plainly erroneous.—ST LOUIS & S. F. RY. CO. v. BRADLEY, U. S. C. C. of App., 54 Fed. Rep. 630.

50. FEDERAL COURTS — Injunction — State Court.—A federal court is not prohibited by Rev. St. § 720, from issuing an injunction to restrain the prosecution in a State court of a multiplicity of threatened suits which have not been actually begun.—TEXAS & P. RY. CO. v. KUTEMAN, U. S. C. C. of App., 54 Fed. Rep. 547.

51. FEDERAL COURTS—Jurisdiction—Injunction against Officer.—The prohibition of injunction against the State courts (Rev. St. § 720) extends to all cases over which such courts first get jurisdiction, and applies to the officers and parties in the courts as well as to the courts themselves. Therefore, a federal court has no power, on the complaint of a legatee and an executor under a will probated in one State, to enjoin an administrator appointed in another State from distributing the funds under his control to the heirs at law.—WHITNEY v. WILDER, U. S. C. C. of App., 54 Fed. Rep. 554.

52. FEDERAL COURTS — Suits against Counties.—The act of Arkansas of February 27, 1879, repealed all laws allowing suits against counties, and provided that any person having a claim against a county must present the same to the county court for allowance or rejection, with the right of appeal to either party from its action thereon: Held, that under this statute the allowance or rejection of a claim either has the force and effect of a judgment for or against the county from which an appeal will lie, or it is merely a preliminary proceeding, which may be carried to an appellate court, where an actual trial is had: and in either view the result is that counties are in substance and effect, suable by the local law, and therefore subject to suit in a federal court by original process.—CHICOT COUNTY, ARK. v. SHERWOOD, U. S. S. C. 13 S. C. Rep. 695.

53. FRAUDULENT ASSIGNMENT — Chattel Mortgage.—Where a chattel mortgage was made and taken by a creditor of a mortgagor upon all his property, its purpose being not to secure a debt due the mortgagee, but also to secure other creditors of the mortgagor not named therein, whose rights are not expressly reserved from the operation of the assignment law of this State, such mortgage is held void, as an irregular, prohibited, voluntary assignment.—STEWART v. STEWART, Neb., 54 N. W. Rep. 828.

54. FRAUDULENT CONVEYANCE—Bona Fide Purchaser.—Where a third mortgagee, who has ample security for his debt, takes a conveyance of the mortgaged property, agreeing to pay therefor no more as a consideration than he would have been compelled to pay in order to protect his rights as third mortgagee, and the conveyance is for an expressed consideration of at least $2,000 less than the fair value of the property, he is not a *bona fide* purchaser, the facts within his knowledge having been sufficient to put him on inquiry.—ALLEN v. STINGEL, Mich., 54 N. W. Rep. 880.

55. FRAUDULENT CONVEYANCE—Preferential Payment.—A failing debtor may prefer *bona fide* creditors by executing to them chattel mortgages before making a deed of assignment, even if the execution of the two instruments is in point of time very close together; and in such case fraud in executing the mortgage is a fact to be proved, and, in the absence of a finding of such fact, it cannot be presumed.—FULLER & FULLER CO. v. MEHL, Ind., 33 N. E. Rep. 773.

56. GIFT CAUSA MORTIS.—A valid gift *causa mortis* takes place where the donor, on her deathbed, delivers to the donee the keys of her trunk which is in the room, and declares that the trunk and its contents are the donee's property.—DEBINSON v. EMMONS, Mass., 33 N. E. Rep. 706.

57. GUARDIAN'S SALE OF WARD'S LAND.—In a collateral attack on a guardian sale of real estate, where all the steps required by statute have been taken, a sale made and confirmed, and a deed made to the purchaser, the sale will be sustained if the court had jurisdiction, although there may be irregularities which, in a direct proceeding would render the sale erroneous.—LARIMER v. WALLACE, Neb., 54 N. W. Rep. 835.

58. HOLIDAYS—Statute.—Acts 1889, ch. 63, § 1, provides that the 22d day of February, and other specified days, are made holidays, on which all public offices of the State "may be closed, and business of every character, at the option of the parties in interest, or managing the same, may be suspended:" Held, that such statute is not mandatory, but permissive, only, at the option of the persons therein indicated. In case of an action pending in a justice's court, such option is with the justice, and not with the parties to the action; and a judgment rendered by a justice on the 22d day of February against a defendant duly served, and in his absence, is not void.—ELROD v. GRAY LUMBER CO., Tenn., 22 S. W. Rep. 2.

59. HUSBAND AND WIFE—Estoppel by Deed.—Where a married woman conveys land to her husband to enable him to mortgage it, and to avoid the statute which prohibits the wife from becoming surety for the husband, of which facts the mortgagee has notice, a recital in the wife's deed that it is made for the purpose of placing title in the husband, "who is, and ever has been, the true owner thereof," does not estop her from showing that she was the real owner when the property was conveyed to the husband, and when the mortgage was executed.—SOHN v. GANTNER, Ind., 33 N. E. Rep. 787.

60. HUSBAND AND WIFE—Non-support of Wife.—In an action by a wife against her husband for the support of herself and infant children, an allegation in the complaint that the husband without cause, had "abandoned" her and them, is a sufficient allegation of "desertion," under Rev. St. 1881, § 5132, cl. 1, which provides that a married woman may obtain provision for the support of herself and infant children when the husband shall have "deserted" her and them without cause, not leaving her or them sufficient provision for her or their support.—CARR v. CARR, Ind., 33 N. E. Rep. 805.

61. INSURANCE—Remote and Proximate Cause.—In an action upon a policy insuring building, machinery, dynamos, and other electrical fixtures of an electric company, it appeared that the fire produced a short circuit in the wires connecting with machinery in a part of the building remote from the fire, and that such short circuit caused such a strain on the machinery as to break it to pieces: Held, that the fire was the direct cause of the damage to the machinery.—LYNN GAS & ELECTRIC CO. v. MERIDEN FIRE INS. CO., Mass., 33 N. E. Rep. 690.

62. INSURANCE— "Totally Destroyed." — Where all the combustible material in a building is destroyed by fire, although portions of the brick walls are left standing, but are so injured by the fire that they must be torn down, for the purpose of insurance the property is totally destroyed; but, if the person insured should use the brick or other material not destroyed to rebuild, the company would be entitled to the value of such brick or material.—GERMAN INS. CO. v. EDDY, Neb., 54 N. W. Rep. 856.

63. INTOXICATING LIQUOR—Selling to Minor.—On the trial of a person charged with selling liquor to a minor, it is incumbent on defendant to prove that he sold it on the written order of the parent, guardian, or person authorized to give such order, since such fact is peculiarly within defendant's knowledge.—REYNOLDS v. STATE, Tex., 22 S. W. Rep. 18.

64. INTOXICATING LIQUORS— Constitutionality of License Laws.—The Texas law, requiring an applicant for liquor license to execute in advance a bond, in the penalty of $5,000, payable to the State, and conditioned that he will not sell liquor to any person after having been notified by an officer, or by certain relatives of such person, not to do so, any of whom are authorized

to sue on the bond in case of a breach; and further imposing a State and county occupation tax, and requiring payment of all taxes a year in advance, is not in conflict with the fourteenth amendment to the constitution of the United States; providing that the privileges and immunities of citizens shall not be abridged by State laws, and that no State shall deprive any citizen of property without due process of law, nor deny to any person the equal protection of the laws.—GIOZRA V. TIERNAN, U. S. S. C., 13 S. C. Rep. 721.

65. INTOXICATING LIQUORS—Illegal Sales.—An incorporated benevolent association, which sells, as such, to its members, for five cents each, tickets entitling the holder at a picnic of the association to a glass of beer or other refreshment, or to participate in some amusement, at his option, who, upon presentation of the ticket, and any number he may so see fit to purchase, obtains from the association beer therefor, which beer is the property of the corporation, as such, thereby becomes a dealer in malt liquors, within the act of March 1, 1879, § 18, which defines such dealer to be one who sells or offers for sale in less quantities than five wine gallons at one time where he does not deal in spirituous liquors. The case would be different where the beer was bought on previous contributions by the members, or as copartners in the purchase, and the assessment was based upon the proportion taken or consumed by each contributor, or like circumstance. — UNITED STATES V. GILLER, U. S. C. C. (Mo.), 54 Fed. Rep. 656.

66. JUDGMENT— Foreign Judgment.— Action on.—In an action on a judgment rendered by an English court having jurisdiction of the parties and subject-matter, the propriety of an order made by that court, denying an application for a commission to take testimony in this country, will not be reviewed.—DUNSTAN V. HIGGINS, N. Y., 33 N. E. Rep. 729.

67. JUDGMENT AS SECURITY FOR NOTE.—Where a judgment is given to secure the payment of an accommodation note, the renewal of the note at maturity does not constitute payment, and discharge the lien of the judgment.—LAUCKS V. MICHAEL, Penn., 26 Atl. Rep. 312.

68. JUDGMENT— Interest. — Interest on a judgment rendered in this State, on an obligation made and entered into in another State, bears interest according to the law of this State.—NEIL V. FIRST NAT. BANK OF IDAHO, Idaho, 33 N. E. Rep. 720.

69. JUDGMENT— Revival—Lien.— Where a judgment against two defendants was revived as against them and H, a terre-tenant, by an amicable *sci. fa.* in regular form, in the caption of which H was described as "terre-tenant," and which contained a confession of judgment, signed and sealed by the plaintiff, by both of the original defendants, and by H, the lien of the original judgment was by the revival preserved both as against the original defendants and H, the terre-tenant; and a judgment obtained against H prior to the execution of the amicable *sci. fa.*, but subsequent to the judgment against the original defendants, must be postponed to the revived judgment. — WHITE V. HARDEN, Penn., 26 Atl. Rep. 312.

70. JUDGMENT — Setting aside. — Mill & V. Code, § 3832, provides that a rehearing can be applied for only at the time at which the decree sought to be affected was rendered. Act 1885, ch. 65, § 1, provides that appeals from an inferior court to the supreme court shall be taken within 30 days after rendition of judgment. Section 2 provides that where the appeal has not been taken within the prescribed time the judgment may be executed: Held, that the act of 1885 limits the time within which a motion for rehearing may be made to 30 days after rendition of judgment, and that after the expiration of 30 days from the date of a judgment the court rendering it had more power to set it aside than if the motion had been made at a subsequent term. GRESHAM V. ELLIS, Tenn., 22 S. W. Rep. 1.

71. LANDLORD AND TENANT—Condemnation of Leased Land.—A tenant's liability for rent is not affected by condemnation of part of the leased premises. But, where the estate of both landlord and tenant in the entire premises is extinguished by condemnation, the obligation to pay rent ceases.—CORRIGAN V. CITY OF CHICAGO, Ill., 33 N. E. Rep. 746.

72. LANDLORD AND TENANT—Forfeiture of Lease.—In an action of unlawful detainer by a landlord against her tenant, because of a breach of the covenant in the lease providing for forfeiture in case of non-payment of the rent reserved, it appeared that plaintiff had sued to recover past due installments of rent, but no demand of payment was made on the day they fell due or at any other time on the demised premises: Held, that plaintiff was not entitled to recover, in the absence of any agreement in the lease waiving demand, or as to place of payment.—PARKS V. HAYS, Tenn., 22 S. W. Rep. 3.

73. LANDLORD AND TENANT— Nuisance.—Defendants leased to complainants the upper part of a building whose windows looked into an open air space, and then leased the entire building, subject to complainants' lease, to third persons, with permission to put in eclectric apparatus, and to build a chimney therefor. Said third persons thereupon built a chimney, which obscured said windows: Held, that complainants had a cause of action against defendants therefor, although their lease contained no express covenants by defendants.—CASE V. MINOT, Mass., 33 N. E. Rep. 700.

74. LIFE INSURANCE— Policy— Foreign Companies.— Where an application for insurance is made in one State, by a resident and citizen thereof, through agents located therein, to an insurance company of another State, the policy, though actually issued in such other State, to take effect by its terms upon payment of first premium, and the policy is delivered and premium paid in the State where the application is made, the law of that State governs the interpretation and force of the contract.—MUTUAL BEN. LIFE INS. CO. V. ROBISON, U. S. C. C. (Iowa), 54 Fed. Rep. 580.

75. LIMITATION OF ACTION— Partnership Property.— A seat in a stock exchange was purchased with partnership funds, and the membership was taken in the name of one of the partners. Seventeen years after the dissolution of the firm such partner sold the seat: Held, that a suit by the other partner to obtain his share of the proceeds through an account and settlement of the partnership affairs was barred, since the statute began to run from the dissolution, and not from theday of sale.—CURRIER V. STUDLEY, Mass., 33 N. E. Rep. 709.

76. MALICIOUS PROSECUTION—Probable Cause.—In an action for malicious prosecution, evidence of facts showing probable cause, which were not known by defendant until three years after the prosecution, is inadmissible. The fact that plaintiff and his companion, after being discharged from defendant's employment, tore paper from the wall of their room in defendant's house and set fire to it, leaving matches and smouldering paper on the floor, is sufficient probable cause to justify a prosecution for arson.—NACHTMAN V. HAMMER, Penn., 26 Atl. Rep. 331.

77. MANDAMUS IN NAME OF STATE.—A relator, having a personal right to be enforced by *mandamus*, may bring an action in the name of the State on his relation. On the facts stated in the petition, the defendant held the money and notes in controversy as trustee, and it was his duty to pay and deliver the same to the parties entitled thereto.—STATE V. SPICER, Neb., 54 N. W. Rep. 849.

78. MASTER AND SERVANT.—Mere knowledge by contractors employed to make alterations in the cellar of a building, owned by a third person, that the stairway leading into the cellar is movable, will not render them liable to one of their laborers who was injured by a fall, caused by the slipping of the stairway while he was going into the cellar, in the absence of a showing that movable stairways are unsafe in themselves, or that the contractors knew or had reason to suppose

that the owner would have the steps insecurely placed.—REGAN v. DONOVAN, Mass., 33 N. E. Rep. 702.

79. MASTER AND SERVANT—Proximate Cause.—While the front brakeman of a train was signaling with his lantern, the light went out. He started to the engine to relight it, when the engineer put on the air brakes, and suddenly stoped the train, causing the brakeman to fall from the car: Held, that the proximate cause of the accident was not the sudden stopping of the train, but the extinguishment of the light in the lantern, as it brought on and set in motion the intermediate series of incidents that resulted in the brakeman's injuries.—PENNSYLVANIA CO. v. CONGDON, Ind., 33 N. E. Rep. 795.

80. MECHANICS' LIENS — Separate Contracts.—Where separate orders for entirely different kinds of material are given, about a month apart, for railroad supplies, such orders are separate contracts; and in order to obtain a mechanic's lien under the above act, separate, itemized accounts must be filed within 90 days from the date of the last item furnished under each order.—CENTRAL TRUST CO. v. CHICAGO, K. & T. RY. CO., Mo., 54 Fed. Rep. 598.

81. MORTGAGE — Sale under Power.—Property was mortgaged to a trustee to secure a debt evidenced by a note, the mortgage containing a power of sale in favor of the trustee, his successors and assigns, in case of default. Subsequently, the trustee wishing to be released, M was appointed his successor, the mortgage assigned to him by a writing on the back thereof, and the note assigned by indorsement. A more formal assignment of the mortgage was executed a few days later, and recorded: Held, that M, either as the successor of the former trustee or in virtue of the assignment of the mortgage debt to him, was fully authorized to exercise the power of sale.—WESTERN MARYLAND RAILROAD LAND & IMP. CO. v. GOODWIN, Md., 26 Atl. Rep. 319.

82. MORTGAGE — Sale under Power.—A sale of land by a trustee made under the terms of a trust deed given while the grantor was sane is not rendered invalid by the fact that the grantor was insane at the time of the sale.—VAN METER v. DARRAH, Mo., 22 S. W. Rep. 30.

83. MUNICIPAL BONDS — Innocent Purchaser—Estoppel.—One who buys municipal bonds at one time in such number as to exceed in amount the limit of the issue authorized by law (being an amount capable of liquidation in a certain time, at a given rate of taxation, based on the assessment rolls) is chargeable with notice, and the municipality is not estopped to plead an overissue.—FRANCIS v. HOWARD COUNTY, U. S. C. C. of App., 54 Fed. Rep. 487.

84. MUNICIPAL CORPORATIONS — Cemeteries.—Mt. Hope Cemetery, in West Roxbury, which has been purchased and improved by the city of Boston under legislative authority, and which it holds, not only for the burial of poor persons, as required by statute, but with the right to make sales of burial rights to any person who may wish to purchase them, whether residents or non-residents, is not held by the city for purposes strictly public, but is held in its private or proprietary character; and it cannot be compelled to transfer the same, without compensation, to a new corporation, formed for the purpose, as required by St. 1889, ch. 265.—PROPRIETORS' CEMETERY v. BOSTON, Mass., 33 N. E. Rep. 695.

85. MUNICIPAL CORPORATION—Change of Street Grade.—A town authorized the relocation of street-railway tracks in one of the streets, and required the company to pave between the tracks, and a limited space on each side. This alteration raised the paved portion of the street about eight inches above the unpaved portion, and the selectmen then raised the grade of the unpaved portion, to render the street safe and convenient for travel: Held, in the absence of an established grade, that such alteration was not a radical change of grade, beyond the power of the selectmen, but was within their authority to order repairs, and hence they were not individually liable for the change of grade to an abutting owner; his remedy being by petition for the assessment of damages, as provided by Pub. St. ch. 52, § 15.—PROCTOR v. STONE, Mass., 33 N. E. Rep. 704.

86. MUNICIPAL CORPORATIONS — Enactment of Ordinances.—In a city of the second class, containing a population of less than 5,000, an ordinance of a general character may be presented, read, and adopted by the city council thereof, on the same day, provided the rule requiring such ordinances to be fully read on three different days is dispensed with by a vote of three-fourths of the members of the council.—BROWN v. LUTZ, Neb., 54 N. W. Rep. 860.

87. MUNICIPAL CORPORATIONS—Negligence.—In an action against a city for the death of a child drowned in a pool upon the public grounds, a binding charge to find for defendant is properly refused where it appears that the pool was on grounds acquired by defendant six months before the accident, and was open to persons of all ages, being inclosed by a stone wall lower than the surrounding surface, and the deceased was thrown into it by the slipping of a stone on the wall on which he was sitting, and which fell with him into the water.—BARTHOLD v. CITY OF PHILADELPHIA, Penn., 26 Atl. Rep. 304.

88. MUNICIPAL CORPORATION — Opening Street.—Where a street has been opened by a city in conformity with a statute, and the assessments and damages paid, without any objection as to the validity of the act, and pipes have been partly laid by a gas company under license from the proper authorities, a property owner cannot enjoin the company, and recover damages, on the statute being subsequently discovered and judicially determined to be unconstitutional; but the rights of the company will be protected, on the principle that acts done under apparent legal authority by *de facto* corporations and officers are valid as to third persons.—KING v. PHILADELPHIA CO., Penn., 26 Atl. Rep. 308.

89. MUNICIPAL CORPORATION — Ordinances.—Rev. St. 1881, § 3333, cl. 6, empowering the board of trustees of an incorporated town to prevent interference with the free use of streets and alleys; and clause 16, empowering it to make and establish such by-laws, ordinances, and regulations, not repugnant to the laws of the State, as may be necessary to carry into effect the provisions of the act; and section 3367, giving such board exclusive power over the streets, highways, and bridges within the corporate limits of the town,—authorize the board to impose a license of three dollars per week or one dollar per day on hack drivers, and to impose a fine of two dollars for each violation of the ordinance.—SCUDDER v. HINSHAW, Ind., 33 N. E. Rep. 791.

90. MUTUAL BENEFIT INSURANCE—Application—Warranty.—An application for membership in a benevolent society, which directs payment of the certificate, on the member's death, to "M H, wife," cannot be treated by the society as a warranty that the beneficiary named is the applicant's wife, in the absence of any intimation in the application itself that the facts therein stated are warranties, though the constitution of the society declares the application to be a warranty, since the constitution is not binding on one who is not yet a member, but who simply proposes to become one.—SUPREME LODGE A. O. U. W. v. HUTCHINSON, Ind., 33 N. E. Rep. 816.

91. MUTUAL BENEFIT INSURANCE—Forfeiture.—Where a life insurance company mails to plaintiff, a policy holder, a notice of the death of another member, which notice requires plaintiff to pay an assessment therein stated within 30 days from the date of the notice, under penalty of forfeiture of his policy, and plaintiff, through no fault of his, did not receive such notice till after the expiration of the 30 days, it was no such notice as, in the absence of an agreement to that effect, would work a forfeiture of the policy.—MERRIMAN v. KEYSTONE MUT. BEN. ASS'N., N. Y., 33 N. E. Rep. 738.

92. NATIONAL BANK—Usury — Affidavit of Defense.—An action against a national bank to recover the penalty for taking usurious interest is an action *ex delicto*, and no affidavit of defense can be required, though the action is in assumpsit, as authorized by the act of 1887.—OSBORN v. FIRST NAT. BANK, Penn., 26 Atl. Rep. 289.

93. NATIONAL BANKS—Crimes.—The offense of making false entries in the books of a national bank, for which an officer of the bank is liable to punishment under Rev. St. § 5209, since it is not a crime of which the State courts have concurrent jurisdiction under section 5328, is exclusively cognizable by the federal courts.—IN RE ENO, N. Y., 54 Fed. Rep. 669.

94. NEGLIGENCE — Independent Contractors.—Defendants contracted to furnish all materials for the construction of the piers for a railroad bridge across a certain river, the materials to be subject to the inspection and approval of the engineer of the railroad company, and to construct the piers according to certain plans and specifications under the continuing inspection and subject to the approval of the engineer: Held, that defendants were independent contractors, and as such liable for injuries to third persons, resulting from their negligence in the performance of the work.—CASEMENT v. BROWN, U. S. S. C., 13 S. C. Rep. 672.

95. NEGOTIABLE INSTRUMENTS—Attorney's Fee.—A provision in a note executed since June 1, 1879, the date of the taking effect of the act repealing the attorney fee law, stipulating for the payment of an attorney's fee to the plaintiff for instituting and prosecuting a suit on the note, is invalid.—SECURITY CO. v. EYER, Neb., 54 N. W. Rep. 888.

96. NEGOTIABLE INSTRUMENTS — Indorsement — Protest.—Where the holder of a note mails it in time by registered letter to a notary for presentment and protest, and through fault of the post-office employees the letter is not delivered, and the holder, on the day after the last day for payment gets the note out of the post office, and has it presented and protested, and notice is given the indorser on the day following, it is sufficient.—NEWBOLD v. BORAEF, Penn., 26 Atl. Rep. 305.

97. PARTIES—Action—Legal Title.—One M purchased certain lands at tax sale, and had the certificates and deeds made to one A, his sister. He testified that he had money belonging to her to invest, and that he purchased the property in question. It was sought to impeach this testimony by showing that after the purchase he had made statements that on account of domestic difficulties he had taken the title in the name of his sister: Held, that as the money paid purported to be that of the sister, and the titles were taken in her name, she could maintain an action against the county treasurer and his sureties for the wrongful sale of the property.—ALEXANDER v. OVERTON, Neb., 54 N. W. Rep. 825.

98. PARTITION—Title in Issue.—Upon a bill for partition, if the legal title to the lands is put at issue, the court of chancery will not proceed to settle such title, but will either dismiss the bill or retain it to allow the title to be settled in an action at law.—SLOCKBOWER v. KANOUSE, N. J., 26 Atl. Rep. 333.

99. PARTNERSHIP — Dissolution.— Act June 2, 1874, providing for the formation of limited partnerships, declares that on voluntary dissolution three liquidating trustees shall be elected by the members, who shall settle the affairs and distribute the assets: Held that, where on the formation of the association it is agreed that it shall be dissolved at the end of five years, the dissolution which then takes place is a voluntary one, and the only method of winding up the affairs is through trustees, and a court of equity has no jurisdiction to entertain a bill for such purpose.—TINDEL v. PARK, Penn., 26 Atl. Rep. 300.

100. PARTNERSHIP—Settlement — Laches of. — Where the surviving member of a firm is executor of his co-partner, and as such pays all the debts of deceased, and settles the estate without any claim that deceased was indebted to the firm, he will be barred by laches from setting up against the proceeds of real estate owned by the members of the firm as tenants in common a claim based on a note signed by deceased and payable to the firm, which is disclosed and produced for the first time 30 years after its date, 18 years after the last indorsement thereon, and 15 years after the dissolution of the firm.—HARDISTY v. HARDISTY, Md., 26 Atl. Rep. 322.

101. PLEADING AND PROOF—Variance. — In an action against a railroad company for obstructing a private way there is a fatal variance between allegations that plaintiff had a right of way along the south line of a certain tract of land, and that at the southeast corner of the tract the company had made an excavation obstructing the way, and plaintiff's proof that he never used the way along the whole line, but by agreement with his grantor had used another route, commencing at the southwest corner, and running along the south line for a short distance, and then northeasterly across the tract.—BOLTON v. MANISTEE & G. R. R. CO., Mich., 54 N. W. Rep. 875.

102. PLEADING — Set-off. — In an action upon an assigned claim, a plea of set-off of a debt due from the assignor which does not allege that said debt accrued before the assignment, is demurrable. — FRANCIS v. LEAK, Ind., 33 N. E. Rep. 807.

103. PLEDGE—Subrogation—Debtor. — It is a general principle that where property is pledged as indemnity by one debtor to another, jointly or severally liable with him for the same debt, the security so pledged inures to the benefit of the creditor who has the right in equity to have the property so pledged applied to the payment of his debt, if it is not paid.—PENDERY v. ALLEN, Ohio, 33 N. E. Rep. 716.

104. RAILROAD COMPANY — Frightening Horse.—Permitting steam to escape from an automatic safety valve attached to a locomotive, frighting a horse, is not negligence rendering the company liable for injuries received by one thrown from the vehicle, where it appears that the use of the safety valve is necessary to the safety of the locomotive, and that there is no practicable method of reducing the pressure on the valve.—LOUISVILLE, N. A. & C. RY. CO. v. SCHMIDT, Ind., 33 N. E. Rep. 774.

105. RAILROAD COMPANIES—Negligence—Fires.—In an action against a railway company for the loss of hay and grass by reason of the negligent escape of fire from its locomotives, evidence is admissible that both before and after the injury complained of defendant's engines had set fire to grass and other combustible matter in the immediate vicinity of plaintiff's premises, and similarly situated. — GULF, C. & S. F. RY. CO. v. JOHNSON, U. S. C. C of App., 54 Fed. Rep. 474.

106. RECEIVERS—Power to Make Loans and Pledge.—Where a bill was filed by the president and directors of a railroad company, alleging that, as a result of an unlawful lease and the diversion of its income, it has been embarrassed, but if properly managed it may extricate itself from its difficulties, and the court appoints its president receiver for the purpose of preserving the property, and with the aid of the court placing it upon a prosperous footing, and no lien creditors are parties, it is competent for such president receiver, with the authority of the court, to pledge collateral and equitable assets of the company to secure loans necessary to its operation, and also to incur a liability for the expenses of a refunding scheme.—CLARK v. CENTRAL RAILROAD & BANKING CO., U. S. C. C. (Ga.), 54 Fed. Rep. 556.

107. RELIGIOUS SOCIETY. — When rights of property are in question, civil courts will inquire whether or not the organic rules and forms of proceedings prescribed by the ecclesiastical body have been followed.—POUNDER v. ASH, Neb., 54 N. W. Rep. 847.

108. RELIGIOUS SOCIETIES — Freedom of Worship.—The federal constitution forbidding congress to make

any law respecting an establishment of religion or prohibiting the free exercise thereof, and the State constitution declaring the freedom of all men to worship God according to the dictates of their own consciences, do not give a church member the right to repudiate the faith and doctrine on which the church was founded, and at the same time insist on his right to exercise and enjoy the benefits and privileges of a member of such church, contrary to the rules and laws on which the church is established.—SMITH V. PEDIGO, Ind., 33 N. E. Rep. 777.

109. REMOVAL OF CAUSES — Who is a Defendant.—A land-owner who is dissatisfied with the award of damages in condemnation proceedings, and who appeals to a State court, as provided by law, is a defendant, for the purpose of removing the appeal to a federal court, although the law of the State (New Jersey) gives him the right on such appeal to open and close; the issue being confined solely to the amount of damages. —HUDSON RIVER RAILROAD & TERMINAL CO. V. DAY, U. S. C. C. (N. J.), 54 Fed. Rep. 545.

110. REPLEVIN — Judgment. — In replevin of a lot of logs, there was a judgment showing the aggregate value of the logs; that defendants were entitled to have them returned; awarding execution for the logs, and, if they could not be found, then for their value. It did not appear that plaintiff placed a separate value on the logs when he replevied them, and they were not separately valued on the trial: Held, that plaintiff was not entitled to return a portion of the logs, and pay the value of the others, which he had shipped away, in satisfaction of such judgment; but he must return the entire lot, or pay their aggregate value.—CONNER V. BATES, Tenn., 22 S. W. Rep. 4.

111. RES JUDICATA.—The doctrine that a judgment concludes the parties forever in respect to the subject-matter of the suit, is not a mere rule of procedure, to be enforced only in cases were a defeated suitor attempts to litigate anew a question once decided against him, but a rule of justice, which must be enforced whenever its enforcement is necessary for the protection and security of rights.—MAYOR V. BAKER, N. J., 26 Atl. Rep. 324.

112. SALE—Delivery.—A foreign merchant contracted for several cargoes of lumber to be delivered free on board ship in the Appalachicola river, seasoned when delivered, within seven months from May 1st, certain advances to be made about June 1st. These advances were made, and the first cargo was prepared by August, piled by itself in the seller's yard, and the buyer notified of readiness. The latter had difficulty in chartering ships, and later the seller's mill and all the lumber were burned: Held, that there was no delivery, and the title had not passed.—SCHREYER V. KIMBALL LUMBER CO., U. S. C. C. of App., 54 Fed. Rep. 653.

113. SALE—Parol Evidence.—In a suit on a written contract to sell all defendant's cattle on certain ranches, except 2,000 head of steers already sold to another purchaser, written and parol evidence of the contract with such other purchaser may be introduced to show that it called for steers two years old and upward, and therefore that the contract in dispute called for all steers on such ranches under that age.—LONERGAN V. BUFORD, U. S. S. C. 13 S. C. Rep. 684.

114. SALE—Payment.—Defendant wrote plaintiff: "If I would purchase a small stock of your lathes, would you take a four months' note in settlement?" Plaintiff accepted the offer, and defendant ordered the goods, and inclosed the note to plaintiff, saying, "The balance over the amount you can remit to me as soon as paid:" Held, that the transaction was a sale, the note being taken only as conditional payment.—SEBASTIAN MAY CO. V. CODD, Md., 26 Atl. Rep. 316.

115. SHERIFFS—Failure to Execute Process.—Rev. St. art. 2298, makes an officer and his sureties liable for the negligent loss of property levied on to the amount of the injury sustained and 10 per cent. thereon, to be recovered by the party injured, on motion in the court from which the execution issued: Held, on the hearing of a motion under the section, that it was error to exclude execution on the ground that it appeared on its face to have been issued more than one year after the date of the judgment, and did not appear to be an alias, as the fact that the judgment was dormant by failure to have execution issued within a year would not make the execution, subsequently issued, void, and it would be the duty of the officer to obey it.—CLEVELAND V. TITTLE, Tex., 22 S. W. Rep. 8.

116. SPECIFIC PERFORMANCE—Contract.—A party invoking the equity powers of a court to enforce specific performance of a contract which he claims is for the sale to him of real estate must exhibit a contract unambiguous and certain.—CLARKE V. KOENING, Neb., 54 N. W. Rep. 842.

117. TAXATION—Exemption.—Const. art. 16, § 5, which declares that "buildings and grounds and materials used exclusively for public charity" shall be exempt from taxation, does not extend to leased property from which revenue is derived, though such revenue be wholly used to support a public charity.—BRODIE V. FITZGERALD, Ark., 22 S. W. Rep. 29.

118. TAX SALE. — One who, in good faith, attends upon a public sale of property for delinquent taxes at the time named in the advertisement, and requests the treasurer to offer the delinquent property for sale, and demands the right to bid therefor, has such an interest therein as will entitle him to prosecute proceedings by *mandamus* to compel the treasurer to discharge his duty by offering said property for sale.—STATE V. FARNEY, Neb., 54 N. W. Rep. 862.

119. TELEGRAPH COMPANIES—Mental Suffering.—Mental suffering, and consequent injury to health and unfitness for business, which result from the negligent delay of a telegraph company to deliver to a father a message announcing a fatal injury to his son, whereby the father is prevented from securing medical attendance, and from reaching his son before the latter's death do not constitute a cause of action by the common law of Virginia.—TYLER V. WESTERN UNION TEL. CO., U. S. C. C. (Va.), 54 Fed. Rep. 634.

120. TRUSTEES—Negligence.—Where a fund directed by a will to be invested by two executors for the benefit of a legatee for life has once been properly invested, it is not, *per se*, negligence for one of the trustees to permit the other to take the actual care and custody of the securities representing it; and in such case the other trustee will not ordinarily be liable for the default of his cotrustee in not paying over the interest, until he has notice of some default or misconduct on his part.—DYER V. RILEY, N. J., 26 Atl. Rep. 327.

121. TRUSTS — Transfer of Registered Bonds. — The government of the United States is not liable for the wrongful act of the register of the United States treasury in permitting a transfer of registered bonds of the United States belonging to a trust estate upon insufficient evidence of authority in the holder to demand the transfer.—GERMAN BANK V. UNITED STATES, U. S. S. C., 13 S. C. Rep. 702.

122. WILL—Construction of Will.—Where a testator devises certain land to his "wife, her heirs and assigns," and then devises all the rest of his property to her, to be used by her during her life, with absolute power to dispose of the same at her discretion, and provides that if any of his estate remains undisposed of at her death it shall be divided among his children, "this proviso to apply to all my estate," the wife takes said land in fee, since the devise to the children is void as a remainder because of the preceding fee, and is void as an executory devise because inconsistent with the unlimited power of disposal given to the wife.—WOLFER V. HEMMER, Ill., 33 N. E. Rep. 751.

123. WITNESS—Impeachment.—To justify the proving of contradictory statements of a witness, for the purpose of impeaching him, the answer of the witness on cross-examination must be material, so that the cross-examining party would be allowed to give it in evidence.—CARTER V. STATE, Neb., 54 N. W. Rep. 853.

ABSTRACTS OF DECISIONS OF MISSOURI COURTS OF APPEAL.

ST. LOUIS COURT OF APPEALS.

APPEAL — Justice of the Peace—Sec. 6342, Rev. St. 1889.—Judgment was rendered before a justice on the 2d day of May, 1892. The transcript of justice showed that "upon that day defendant filed affidavit praying for an appeal, also signed bond for appeal. May 3d that bond was approved and appeal allowed to circuit court." The appeal bond showed that it was attested and approved on the 3d day of May, 1892: Held, that under statutes governing appeals from justice courts the appeal was not taken at day of trial. The record only recites that defendant signed the bond on May 2d. It not appearing when it was signed by the surety the presumption arises that bond was not completed until the day on which it was approved and allowed. Affirmed.—HILL v. WEIS.

ATTACHMENT — Interplea—Evidence.—In an attachment suit the interpleader assigned for error the admission of evidence of declarations of the alleged fraudulent grantor of the interpleader in the absence of the latter: Held, that declarations were competent if made before sale and delivery of possession of the goods, as bearing on the intent of the declarant, though not competent as to intent of grantee (interpleader), without showing any knowledge of them, on his part, or that there was any conspiring between him and the declarant to commit fraud, and that declarations were made in furtherance of such conspiracy. The record failing to show that they were made within these limitations their reception was error. Reversed. — PETERS-MILLER SHOE CO. v. CASEBEER.

BILL OF EXCHANGE—Acceptance—Sec. 724, Rev. St. 1889.—Plaintiff presented, to the clerk or agent of defendant, an unconditional written order for the payment of a certain sum of money to plaintiff or his order drawn by a third person upon defendant. The clerk took it saying it could not be paid until next pay day. The order was never returned or paid to plaintiff, but the amount of the order was deducted by defendant upon a subsequent settlement with the drawer: Held, that under the facts in the case there was evidence to meet the statutory exemptions (Sec. 724, Rev. St. 1889), to the rule as to the necessity of a written acceptance. Sec. 719, Rev. St. 1889. Affirmed.—LOCKHART v. MOSS.

DAMAGES—Sec. 2611, Rev. St. 1889—Railroads Killing Stock.—In a suit under the statute to recover double damages for the killing of a cow by defendant's cars, defendant, appellant herein, contends that evidence failed to show that cars were operated at locality of injury. As the evidence tended to prove by necessary implication from the circumstances that railroad was operated and run on the road-bed in township where the cow was struck, held, that contention is unsupported by the record. Affirmed.—SNIDER v. RY.

FOREIGN JUDGMENTS — Validity of Service—Burden of Proof.—In a suit for divorce the court dismissed plaintiff's application for the reason that parties had been previously divorced by decree of circuit court of X, county Ark. The certified copy of record of proceedings in said court shows that plaintiff was served with process in B county, Mo., by a private person. Plaintiff claims that no jurisdiction of the person by the Arkansas court was shown: Held, that as judgment of sister State contained the jurisdictional recital that the defendant was legally summoned, the recital must be accepted as *prima facie* evidence that the particular process and mode of service is in conformity with the local law of the State where judgment is rendered, and that presumptions are in favor of the regularity of the judgment and all proceedings leading up to it, and that burden of proving contrary was on the defendant. Affirmed.—WILLIAMS v. WILLIAMS.

INSTRUCTIONS—Insurance—Agency.—In a suit upon a contract for insurance to recover for a loss, the court assumed in its instructions that if agent had authority to receive applications and collect premiums, he also could bind company in contracts for insurance, held, that this was error, as acceptance of proposal is the completion of the contract, the agent could not bind the company unless he had authority to so accept. Reversed.—TRASK v. INS. CO.

JURISDICTION OF APPELLATE COURTS.—Appellant was tried and convicted, under an indictment framed under Sec. 3490, for an assault with intent to commit rape and punishment assessed at six months' imprisonment in the county jail: Held, that crime charged was a felony, and under Const. Sec. 12, art. 6, of 1875 and Sec. 5, of amendment 1884, court has no jurisdiction. Transferred to supreme court.—STATE v. MELTON.

JURISDICTION.—In an action for the collection for a road poll tax under Sec. 7816, held, that sections 7815-16, governing the collection of this tax, involve the construction of the revenue laws of this State and appellate court has no jurisdiction. Transferred to supreme court. MOORE v. VAUGHN.

SEC. 6864, REV. ST. 1889—Mechanic's Lien—Personal Judgment against Married Woman.—In an action to enforce a mechanic's lien, the owners of the property, husband and wife, defendants, and parties plaintiff, appeared in open court and agreed that judgment be rendered against defendants in favor of plaintiff for a certain sum as debt and damages. The court found all facts necessary to establish a mechanic's lien and judgment was rendered accordingly. The validity o judgment is now challenged as against the wife: Held, that Sec. 6864, Rev. St. 1889 which permits a married woman to sue and be sued, contract and be contracted with, as if she were a *feme sole*, clearly authorized the confession of the moneyed part of the judgment by the wife. Affirmed.—BEARDEN v. MILLER.

SEC. 3547, REV. ST. 1889—Petit Larceny—Instructions.—Defendant was prosecuted under an indictment before a justice of the peace charging him with petit larceny. He was convicted before justice and in the circuit court. Upon appeal, held, that an instruction that jury should find the defendant guilty if they found he did carry away the property as charged, without requiring the jury to find that the property belonged to a third person, was erroneous. The statutory definition of the offense necessarily requires that the property should be found by the jury to belong to a third person, and the jury should have been so directed. Reversed.—STATE v. CROW.

PRACTICE—Bill of Exceptions.—On appeal from circuit court plaintiff complains of the defendants instructions and the action of the court in excluding certain evidence offered by him. It not appearing that the evidence was inserted in the bill of exceptions or that a copy was attached to the bill at the time of signing: Held, that appellate court is not entitled to look into the same and rejecting the evidence, nothing is left for review. Affirmed.—MESSICK v. FAIRBURN.

REPLEVIN — Measure of Damages — Instruction.—An instruction, that if the jury found for the defendant they will find value of goods replevied herein at the present time and state amount in their verdict, it appearing that defendant had only a special interest in the property, held, erroneous in so far as it was incomplete. The jury should have been instructed to find not only the value of the goods at the date of trial, but also value of defendant's special interest in the property in the event that such special interest was less than the value of the goods. Affirmed upon condition.—PIERCE v. LOWDER.

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